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A TREATISE

ON THE LAW RELATING TO

BANKS AND BANKING;

WITH AN APPENDIX

CONTAINING

THE NATIONAL BANKING ACT OF JUNE 3, 1864,
AND AMENDMENTS THERETO.

BY

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TO THE

HON. JOHN LOWELL,

JUDGE OF THE DISTRICT COURT OF THE UNITED STATES,

I DEDICATE THIS BOOK;

IN TOKEN OF MY RESPECT FOR THE INTEGRITY, LEARNING, AND COURTESY WHICH HAVE DISTINGUISHED HIS CAREER AT THE BAR AND UPON THE BENCH.

JOHN T. MORSE, JR.

PREFACE.

Questions in relation to banking law, involving interests of great magnitude, have of late arisen in unusual numbers. But those engaged in investigating them have been cast upon the trackless wilderness of the reports, without guide or aid of any description from treatises or text-books on the subject. English works are nearly useless on this side of the water, since English legislation and usages differ widely and materially from our own. No thorough and sufficient book has ever been attempted by an American writer. It seemed to me that there was not only room but even a necessity for such an undertaking; and when I entered upon the task and found how it grew and expanded upon investigation; when I found how many doctrines of the law had been expounded, having reference solely to the banking business, which had never been brought together and elucidated in connection with each other, or upon any uniform principle; when I found what multitudes of cases had arisen and been adjudicated which had never been collected, compared, or criticised, which might be overlooked, overruled, practically lost to the profession, I learned that the need for such a work as I contemplated was even far greater than I had believed it to be.

How well I have met the demands of my task I cannot pretend to judge. That imperfections should exist in my work

may be regarded as inevitable. It is almost an impossible achievement to discuss in an absolutely exhaustive manner a broad legal topic where the footsteps of no predecessor serve to guide or to warn. It cannot be expected of the pioneer that he should finish his work beyond the possibility of improvement. I know that I have fallen far short of such a consummation; and I must rest satisfied if what I have done shall prove substantially useful, and shall betray no greater want of finish than may be justly deemed unavoidable and pardonable in so difficult a labor.

JOHN T. MORSE, Jr.

16 Pemberton Square,
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DEFINITIONS.

The definitions of the words Bank, Banker, and Banking, in Worcester's Dictionary, are too deficient in precision to be of any use for legal purposes. Those given by Webster are, likewise, certainly open to criticism; but as they are the best there are, we give the pertinent portions of them, as follows: —

"*Bank.* — 4. *By analogy.* A collection or stock of money, deposited by a number of persons, for a particular use; that is, an aggregate of particulars, or a fund; as, to establish a bank, that is, a joint fund."

"6. A company of persons concerned in a bank, whether a private association or an incorporated company; the stockholders of a bank or their representatives, the directors acting in their corporate capacity."

"*Banker.* One who keeps a bank; one who traffics in money, receives and remits money, negotiates bills of exchange, &c."

"*Banking.* The business or employment of a banker; the business of establishing a common fund for lending money, discounting notes, issuing bills, receiving deposits, collecting the money or notes deposited, negotiating bills of exchange, &c."

Of these definitions the second is both the least satisfactory and the most important. For the question will often arise, in reference especially to taxation, whether or not a person or firm doing business on his or their own account, and not as a corporation or association, is a banker or a banking firm. Clearly the fact of "trafficking in money" does not suffice to convey this legal character.

Our own view of the subject is supported by no direct adjudications placing any technical construction upon the term, but is obtained from a general consideration of the topic of the law and business of banking. To render an individual a banker, then, the following facts should combine: —

I. He must receive on general deposit the funds or money of other persons, which he must mingle together or with his own money or capital, and use as a general fund subject to his own sole control.

II. This general and concrete fund he must use for the prosecution of some of the functions of the banking business. If he simply uses it for what are properly called investments, which from time to time he changes, as he deems advisable, he rather resembles a trustee than a banker. But if he uses it for the prosecution of any description of banking business, as for the purpose of making

temporary loans and discounts, of dealing in exchange, foreign bills and credits, and the remission of money, or in the transaction of any like matters which are recognized as departments of the banking business, then he is properly a banker. He need not combine all these functions; the exercise of any one of them would suffice.

III. Generally speaking, a banker would also be under the obligation of allowing his customers to draw against their deposits, in substantially the same manner as an ordinary depositor in an incorporated bank draws checks upon the bank. It is possible, however, that arrangements might be made by which the depositors should agree not to draw for a certain time, or to leave always a certain sum to their credit, or not to draw without notice of one or more days. Agreements of this description need not prevent the character of banker from accruing. But it is essential that the deposits should be in the nature of general deposits. The fact that a man borrows from another a certain sum and uses it for loaning, or discounting, or dealing in exchange, no more makes him a banker than does a similar use of his own money; and it cannot be questioned that a man who simply discounts or buys and sells exchange with his own private funds is not a banker in the proper and strict sense of the term. As is easily to be gathered from the definitions of Mr. Webster, there must be a joint character, a joint stock, a combination of the funds of several, as a primary condition of the existence of a bank or banker, or of the transaction of a banking business. An individual, not acting under a corporate form or style, but simply as one man dealing with another, lending to that other money belonging to the lender himself, is not a banker but a money-lender, even though the loan takes the form of a discount.

In 1866 the Congress of the United States thus defined a bank or banker: —

"Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or banker." Acts of 1865–6, ch. 184, amendatory of sect. 79 of the Internal Revenue Acts of June 30, 1864, and March 3, 1865.

This enactment does away with the necessity of a joint stock and of the combination of funds through the medium of general deposits. It would in most cases render private money-lenders, bankers. Its intent, however, is not to have this force generally, but only for the specific and narrow purpose of taxation. Every money-making occupation is to be taxed; a few broad lines are drawn, and the whole community is marshalled into the various areas by means of this and similar imperative definitions. The act does not say a private money-lender is a banker, but simply that he shall be taxed as such; since his business is more nearly akin to banking than to any thing else. But for purposes of strict legal construction, in all questions arising beyond the control of the provisions of this act, these arbitrary boundary lines are valueless. A private money-lender could not have been taxed as a banker in the absence of this express legislation; and it was to remedy this that the legislation was deemed necessary.

BANKS AND BANKING.

BANKS AND BANKING.

CHAPTER I.

THE FRANCHISE, AND GENERAL AND IMPLIED POWERS THEREUNDER.

Right of Banking.—Restraining Acts.

AT common law, the right of banking pertains equally to every member of the community. Its free exercise can be restricted only by legislative enactment; but that it can legally be thus restricted has never been questioned. After laws upon the subject have been passed, the business must be undertaken and conducted in strict accordance with all the provisions contained in them. It is not in its nature a corporate franchise, though it may be made such by legislation, and individuals may be prohibited from transacting it, either altogether in all its departments or partially in any specified ones. A law which forbids the carrying on of "any kind of banking business" is a total prohibition against each particular department of the business, though conducted singly, and may be infringed equally by exercising any separate one of the various banking functions as by exercising all.[1]

But the restraining statutes, being really in derogation of common-law rights, will always be interpreted, with reasonable

[1] Curtis *v.* Leavitt, 15 N. Y. 9 (p. 52); Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 371; The People *v.* Same, 15 Johns. 358; Same *v.* Bartow, 6 Cow. 290; Nance *v.* Hemphill, 1 Ala. 551; State *v.* Williams, 8 Tex. 255.

liberality, in favor of the supposed infringer; and when they are penal in their character they will be construed with considerable strictness in his favor. Isolated acts do not constitute an infringement. Thus, discounting notes is one of the most important of banking functions, and the one which, next to the utterance of bills for circulation, is of most interest to the public, and has therefore been most frequently and most carefully regulated by statute. But any person may occasionally discount a note for another without coming within the legislative prohibition. If he is simply dealing with his own funds, he is not properly encroaching upon the business of banks in the same department. For, in order to bring discounting within the proper definition of a banking function, it must be done with money, in part at least that of other persons, intrusted to or deposited with the discounter, so that he has the practical use and control of it for these purposes as fully as if it were his own. Even if he does use the money of others, he must do it, not on comparatively rare occasions, and as the special agent of each one of them empowered to this specific end; but with some degree of frequency, and as a general agent having control of the combined or intermingled funds of several.[1] In New York, restraining statutes, penal in nature, and in their exact phraseology treating only of "associations or companies," have been declared to have no application to individuals. Any single person may enjoy all his common-law rights unimpeded by them.[2] But, upon the other hand, no person can enjoy any of the powers or privileges granted or appurtenant to associations or companies, even though for the purpose of conducting his business he assumes the style of a corporation. He may furnish all the capital, may control all the business, may be practically the bank itself, yet he must go through all the forms of organiza-

[1] Utica Ins. Co. v. Scott, 8 Cow. 709; People v. Brewster, 4 Wend. 498.

[2] Bristol v. Barker, 14 Johns. 205; Codd v. Rathbone, 19 N. Y. 87. To the same effect is also the law in Illinois. Hunt v. Divine, 87 Ill. 137.

tion prescribed in the organic banking laws of the country or State before he can be entitled to any of the rights which inhere in corporations only by virtue of those laws.[1]

The purpose of restraining acts is, of course, to secure the public welfare and safety from the inroads of incompetent men nd swindlers. But, serious as is the evil to be guarded against, no other means of defence appear to exist against it than precisely those penalties which are provided in the law itself for any breach of the law. No other punishment can be inflicted than that laid down in the statute, and means of prevention can be sought only from the same source. Equity will not intervene to check infringements, and even systematic conduct of the banking business, in direct contravention of enacted law, will not be enjoined on the ground that it is a mischief or a nuisance to the community.[2]

Acts of Incorporation.

Banking corporations or associations, like others, may come into existence, either under a charter or special act of incorporation, or under a general organic law. In the former case, the courts seem generally to have regarded the acts of incorporation, and likewise of course all acts supplementary thereto, as public laws, not requiring to be established by special proof, but to be judicially noticed within the State where the bank is situated.[3] The authorities cited do not, however, assume to establish a general and abstract rule of universal application. They simply indicate the tendency of courts in which questions concerning specific acts have arisen. Instances of a contrary nature must be expected occasionally to occur.[4]

[1] Hal ett *v.* Harrower, 33 Barb. 537.

[2] Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 371; Same *v.* Bank of Niagara, 1 Hopk. 354.

[3] Stribbling *v.* Bank, 5 Rand. 132; Bank of Utica *v.* Magher, 18 Johns. 341; Vance *v.* Bank, 1 Blackf. 80; Towson *v.* Havre de Grace Bank, 6 Har. & J. 47; Williams *v.* Union Bank, 2 Humph. 339; Hays *v.* Northwestern Bank, 9 Gratt. 127.

[4] Agnew *v.* Bank of Gettysburg, 2 Har. & Gill, 478.

Location.

As a general rule, a bank can carry on business only in the place where it is empowered to do so by its charter. Branch banks cannot be established elsewhere, except under actual legislative authority. It seems, that agencies for specific purposes, as for the redemption of bills or the dealing in bills of exchange, may be established in other places. In these cases, it is for the convenience of the public that such should be the case.[1] But it cannot be supposed that an agency for the exercise of the more important and valuable functions, such as issuing circulating paper or discounting notes, or an agency designed to carry on the general business of banking, would be regarded as legal. For, in such case, the nominal establishment of agencies might easily result in the practical establishment of a network of branch banks throughout the State.

General and Inherent Powers of Banking Associations.

It is necessary to confer in distinct terms in the charter or act of incorporation only those powers which the company could not otherwise exercise, or those concerning which there might be some doubt. Various powers have been at different times declared by the courts to be inherent, and to be properly enjoyed by banking associations simply by virtue of their creation and existence as such, and for the designated end of conducting the banking business. But powers of this nature, being based only upon a legal implication, must be used only in a manner and for purposes strictly consistent with such restrictions, and in furtherance of such duties, as are specifically prescribed by law. Thus a bank, though not directly thereto empowered by its charter or by the organic act, may borrow money. It is a necessary and inherent privilege. But it is limited by the same necessity or intrinsic propriety which

[1] City Bank of Columbus *v.* Beach, 1 Blatchf. C. C. 425: Bank of Augusta *v.* Earle, 13 Pet. 519; People *v.* Oakland County Bank, 1 Dougl. 282; Tombigbee R. R. Co. *v.* Kneeland, 4 How. U. S. 16.

gives it birth. The borrowing must be incidental to the legitimate banking business of the association. Otherwise, the act would be *ultra vires;* as, if the loan was obtained for use in speculation.[1]

A banking corporation can engage in no business transaction which is not, properly speaking, of a banking nature, and within the scope of the purposes for which it was permitted to be organized. The powers with which it is invested must be exercised in strict subordination to this purpose, for the prosecution of which alone they were conferred. A transgression, though under color of an act covered by the designated power, will be illegal. It cannot speculate or traffic either in financial securities or in merchandise. It need not be positively prohibited from doing so in the charter or organic law. For it owes its powers as it owes its existence to the terms of that charter or law. It is not restricted like an individual from the exercise of a wide range of other powers which, in the absence of restriction, it would enjoy; but its power to do any act at all is due wholly to the legislation of which it is a creature, and must be either the direct or necessarily incidental gift of that legislation. When, therefore, it is specifically permitted to conduct a banking business, it has no power to do any other species of business; not because it has been stripped in any manner of that power, but because that power has never attached to it. A bank may however do, on isolated and especial occasions, or for certain purposes, what it cannot do generally and for all purposes. It cannot buy and sell merchandise, but it can take merchandise from a debtor, if this is the only way to save the amount of the debt; and of course having taken property of any nature for this proper purpose it may sell it in any manner that will bring the best price. It may purchase public stocks in order to deposit them, under a

[1] Curtis *v.* Leavitt, 15 N. Y. 9; Barnes *v.* Ontario Bank, 19 id. 152; Leavitt *v.* Yates, 4 Edw. Ch. 184; Safford *v.* Wyckoff, 4 Hill, 442; Talman *v.* Rochester City Bank, 18 Barb. 123.

law requiring such stocks to be deposited as a security for circulation, or in order to invest its surplus funds in them; it may loan upon them as security, and sell them if need be to save the debt. But it cannot "*traffic*" in them; it cannot buy them with the view to sell them shortly at an anticipated advanced price. Such would not fall within any department of the general province of banking, which alone the association can carry on, and which it must carry on only in the manner, with the powers and for the objects, directly set forth or necessarily implied in the law of the corporate existence.[1] In a case in Vermont, indeed, it was once said that a clause in a bank charter prohibiting the bank from dealing in any goods, wares, merchandise, or commodities was in derogation of the common and ordinary powers of the corporation. The full breadth of this language would certainly set the doctrine of the case at variance with the views expressed above. But the reasoning in support of that doctrine is too clear, and the authorities are too strong, to be brought within the range of doubt by this solitary adjudication. More especially since the sweeping statement of the legal theory in that opinion was enunciated for the insignificant purpose of protecting the bank in a purchase of shares in its own capital stock, a proceeding which could have been defended at much less expense of questionable generalization.[2]

Power to hold Real Estate.

Ordinarily, it is no part of the banking business to hold or deal in real estate. No general right to do so can be considered to be inherent in a bank. Certain obvious cases, however, in which it is eminently proper, almost even necessary, that a bank should be able to acquire, to hold, and to sell land

[1] Comstock *v.* Willoughby, Hill & Den. 271; Talmage *v.* Pell, 8 Seld. 328; Leavitt *v.* Yates, 4 Edw. Ch. 134; Sacket's Harbor Bank *v.* Pres. of Lewis County Bank, 11 Barb. 213; Portland Bank *v.* Storer, 7 Mass. 483. See also Curtis *v.* Leavitt, 15 N. Y. 9, which, properly interpreted, supports the above doctrine.

[2] Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 18 Vt. 131.

and interests in land, will suggest themselves at once to every mind. Thus it may often, especially in small towns, be impossible to obtain a building with the suitable appliances for security, unless the corporation can buy land and erect a structure for itself. The mortgage or conveyance of real estate to it may often be the only means by which debts owing to it can be secured or discharged. If a bank came into possession of land in perfect good faith for either of these purposes, and held it or sold it only in due and *bona fide* prosecution of these objects, it seems unreasonable to imagine that the most rigorous court of justice would declare it illegal. But the necessity of discussing the question of the abstract legality of such proceedings has been nearly always saved by the insertion in charters and organic laws of clauses specifically enabling banks to acquire, hold, and sell real estate for these purposes.[1] The legislative expression of this power of course excludes its exercise otherwise than in precise accordance with the statutory provisions. The holding, acquiring, or selling to any greater extent, in any other manner or for any other end, than is therein set forth, would be unquestionably illegal.[2] The power to purchase land or to take it in mortgage or by absolute conveyance, without the additional expression of the power to sell it or to assign the mortgage, will by necessary implication confer those powers also, and even, it has been held, the power to mortgage it.[3] Further, it must be regarded as appurtenant to, or even a part of, the power to take land in mortgage or pledge, that the bank should also be permitted to deal in reference to the land or interest therein, thus acquired, in any manner, either by buying in any outstanding title or interest, or in any other way whatever, that may prove desirable for rendering the security more perfect or more available.[4] The courts seem generally to have been in-

[1] Thomaston Bank *v.* Stimpson, 21 Me. 195.

[2] Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

[3] Jackson *v.* Brown, 5 Wend. 590; Curtis *v.* Swartwout, 1 N. Y. Leg. Obs. 406.

[4] Ingraham *v.* Speed, 8 Miss. 410.

clined to construe the privileges of this nature conferred upon banks in a very liberal way. The foregoing cases and instances certainly do not appear to trespass beyond strict justice; but others can be added where the bounds of reasonable construction have been much more freely extended. Thus, a bank authorized to hold as much real property as might be necessary for its immediate accommodation, was held to have the right to buy up the land in the neighborhood of its banking-house, to erect fire-proof buildings thereon, and then to sell these out again; the end being of course the greater security of its own building.[1] The case of Baird *v.* Bank of Washington[2] contains a long and interesting dissertation upon the rights which were conferred upon the bank by a clause in the act of incorporation, allowing it to hold "such lands as were *bona fide* mortgaged or conveyed to it, in satisfaction of debts previously contracted in the course of its dealings." The reasoning and language of the court will apply to a great number of similar clauses in other incorporating acts, in which language essentially identical with this is of frequent occurrence. It was declared that the right to commute debts for lands was general, and was not limited to cases where any doubt existed as to the perfect safety of the debt. The effect of the words employed was simply to prohibit colorable commutation whereby a real purchase might be effected under a technical disguise. Provided the debt was pre-existing, and was a *bona fide* one, that is to say, not contracted originally with the purpose of being discharged by the conveyance of real estate, the conveyance would be strictly valid; although, without it, the safety of the debt must be unquestionable. The court also added, as a *semble*, that if the conveyance were made to trustees for the bank, with the intent to raise money by selling it, and not with a view to holding it permanently, neither the letter nor the spirit of the statute would be violated. Further, the opinion was expressed, on the strength of the decision in

[1] Banks *v.* Poitiaux, 8 Rand. 186. [2] 11 Serg. & R. 411.

Leazure *v.* Hillegas,[1] that even if the bank should take from a debtor real estate, which it had no right to hold, the title of the bank therein would be defeasible only at the instance of the State: that, if the title should be set aside in a process thus instituted, the land would not revert to the grantor of the bank, but would, apparently, fall in to the State itself; but that the debtor would have been fully acquitted and discharged from his indebtedness, and the loss would have to be borne wholly by the bank. This view, though properly only an *obiter dictum*, was expressed with a good deal of confidence, and apparently upon a mature consideration of the whole subject. It is certainly difficult to see why it is not sound. The law would hardly help the debtor to avoid the transaction, and obtain a reconveyance of his land, even though the debt should be revived; and if not he, who else could so properly seek to undo the illegality as a public officer on behalf of the State whose statute had been infringed? It would be obviously unjust to punish the debtor who, if guilty at all in the transaction, must doubtless have been the less so of the two parties. So that the infliction of the loss upon the bank is a penalty, great possibly, but unavoidable and not unjust, for a wilful infringement of that law to which it owes its very existence.

Contracts of Banking Corporations.

It is primarily essential to the validity of any contract, to which a bank is a party that the undertaking of the bank therein should be within the scope of its legitimate powers. As it is utterly incompetent to act, so it is equally incompetent to agree or bind itself to act, in any business, for any purpose or in any manner not authorized by the law of its corporate existence. Its assumption or promise to perform any act trespassing beyond these limits is void *ab initio*, and the fundamental defect can be cured by no subsequent proceeding short of an act of the legislature. There appears to be but one excep-

[1] 7 Serg. & R. 313.

tion to this broad general rule, an exception which has been allowed only in deference to obvious justice. Where the bank issues its promise to pay in a form in which it has a right to issue promises to pay, but under circumstances which render the issue of this especial promise illegal and void as *ultra vires*, the contract may be enforced against the bank by a *bona fide* holder for value and without notice. But even in this case a holder with notice, although for value, could not recover. Thus, for example, it is a general rule that a bank has no power to engage as surety for another in a business in which it has no interest and from which it can derive no profit. Therefore it has no right to become an accommodation indorser. If it does so, the indorsement will be utterly void in the hands of any person having notice of the fact that it was made for accommodation. But, inasmuch as a bank may become an indorser for divers legal purposes, and the contract can therefore show upon its face no signs of invalidity, it will be treated as valid in the hands of a holder for value without notice of the facts.[1]

The old rule requiring the attestation of the corporate seal as essential to the validity of corporate contracts has long since been superseded by the imperative necessities of business.[2] A bank may now be bound by any undertaking entered into on its behalf by any of its officers or agents, provided that they have been thereto duly authorized. The subject of contracts made on behalf of the bank by its various officials is, however, elaborately discussed in the chapter upon the Powers, Duties, and Liabilities of Officers, so that it may be dismissed here with only very brief remarks. The bank will be bound, provided the officer assuming to bind it in any matter was either in fact duly authorized, or was held out to the world as authorized, to

[1] Safford *v.* Wyckoff, 4 Hill, 442; Vallett *v.* Parker, 6 Wend. 615; Bank of Genesee *v.* Patchin Bank, 3 Kern. 309. See also argument and citations *per* Beardsley, in Leavitt *v.* Palmer, 3 Comst. 19 (pp. 24, 25).

[2] Bank of Columbia *v.* Patterson's Administrator, 7 Cranch, 299; Fleckner *v.* Bank of United States, 8 Wheat. 338.

deal and undertake on its behalf in that business. Otherwise it will not be bound.[1] But undertakings of any officer beyond this scope may be rendered binding by subsequent ratification, like the undertakings of any other agent, subject to one restriction. If the authority which he assumed was one with which the government of the bank had the power to invest him, the contract made by him will be voidable only, and the ratification will be sufficient. But if the authority assumed was one which no action of the directorial board could delegate to the official who sought to exercise it, then his act is absolutely void, and is beyond the reach of ratification; for that cannot be rendered valid after performance which could not have been rendered valid before performance.[2] Ratification may be by any of the usual methods: either by a direct vote of ratification on the part of the directors; by a silent acquiescence, with knowledge, on the part of any officials competent to ratify; or by the receipt and enjoyment by the bank of the profits or results of the act.[3] Though the agreement be so made that there can be no doubt that the officials are personally bound by it in their individual capacity, still the bank also, additionally to their liability, will be bound, provided that the intention at the inception of the contract was to bind the bank, that the officials had the power to make such a contract on behalf of the bank, and that the use and benefit of the contract, if any, did actually accrue to the bank.[4] The doctrines of this paragraph are equally applicable to sealed and parol, to express and to implied, contracts. The general rule may be stated as follows: In all matters within the scope of the corporate institution, all contracts, sealed or parol, written or verbal, made by its authorized agents within the scope of their real or implied agency, are the express undertakings of the corporation; and all duties imposed on its

[1] United States *v.* City Bank of Columbus, 21 How. U. S. 356.
[2] See *post*, "Powers, Duties, and Liabilities of Officers."
[3] Curtis *v.* Leavitt, 15 N. Y. 9; Medomak Bank *v.* Curtis, 11 Shep. 36.
[4] Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299.

agents by law, and all benefits conferred at their request, likewise within the scope of their real or implied authority, raise implied promises on the part of the corporation, which may be enforced against it.

The illegality which is set up to defeat a contract on the ground either that the corporation exceeded its powers in making it, or that essential formalities imposed in direct and imperative terms by legislative enactments were disregarded, must go to the validity of the very contract itself, not alone to the written evidence thereof; since otherwise no practical advantage will result to the party setting it up. The matter has been very thoroughly discussed in several important cases in New York, and this doctrine has by no means escaped severe criticism. But in spite of criticism it has been too firmly established to be considered open to doubt. The series of causes known as the "Utica Insurance Company Cases" form the basis of the adjudication, of which the result is, that where certificates of deposit, bonds, or other instruments, expressing contracts, are issued, which the corporation had not power to issue, the holder cannot enforce them and sue upon them as contracts. If he undertakes to do so he will be defeated by their illegality. But he may abandon them and go upon the original cause of action, which was the deposit with, or the loan to, the bank, and then he will be allowed to recover, provided that the bank had the right to receive the deposit or to contract the loan. The document issued cannot itself be sustained; but if it is abandoned altogether, the fact of its wrongful issue will not operate to prevent the success of a suit for money had and received.[1] *A fortiori* recovery could be had in such a suit,

[1] Utica Insurance Co. *v.* Scott, 19 Johns. 1; Utica Insurance Co. *v.* Kip, 8 Cow. 20; Utica Insurance Co. *v.* Cadwell, 3 Wend. 296; Utica Insurance Co. *v.* Kip, id. 369; Utica Insurance Co. *v.* Bloodgood, 4 id. 652. Cited and approved in Curtis *v.* Leavitt, 15 N. Y. 9; Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. 23; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Robinson *v.* Bland, 2 Burr. 1077; Cundy *v.* Marriott, 1 Barn. & Ad. 696; Wilson *v.* Wysar, 4 Taunt. 288. By implication, the same doctrine is sustained by Ch. Walworth in Saf-

by virtue of this doctrine, where the instrument issued was not intrinsically illegal, but was only rendered so by reason of its not being executed with precisely the formalities demanded in the incorporating act.[1] But where the instrument is negotiable paper of any description, and perhaps even in other cases, the fact that it has not been signed by the officers of the bank who are designated in the law as the persons who shall sign, does not even invalidate the contract itself in the hands of a *bona fide* holder, unless the same statute expressly and in terms enacts that an instrument not so signed *shall be void*. The mere declaration that contracts "*shall be signed*" by certain officials only points out the mode in which, if any contract be executed, it shall be imperatively regarded as sufficiently executed. But it does not necessarily deprive the corporation of the right to delegate to its officers power to make contracts which shall be valid without these specified signatures. If the statute contains no positive prohibition, depriving the association of the right to appoint other agents to contract and sign on its behalf, such deprivation will not follow as an implication from the mere statement that contracts "shall be signed by" designated officers. "Where the associates have not lodged the power elsewhere; where the matter is to be determined upon the statute alone, without any action of the artificial body, contracts within the scope of its general powers must be signed by [the officials appointed in the statute]. But the statute was not designed as an appointment of particular agents, to the exclusion of all right in the corporate or associate body itself to appoint other agents to do lawful acts and enter into lawful contracts." Such was the language of Judge Comstock in the case of Barnes *v.* The Ontario Bank,[2] following the decision in the earlier case of Safford *v.* Wyckoff, *supra*. Since these

ford *v.* Wyckoff, 4 Hill, 442, where upon a written contract improperly executed, he thought plaintiff should not be allowed to recover "without showing that he has paid money thereon, which has been applied to the use of the association, so as to create a contract by operation at law."

[1] See Ch. Walworth, in Safford *v.* Wyckoff.

[2] 19 N. Y. 15.

decisions the question seems to have been regarded as laid at rest in New York. But the views of Chancellor Walworth, expressed to a somewhat different effect in the last-named case, though overruled by a majority of the senators, will doubtless suffice with some minds to throw a doubt upon the propriety of this ultimate conclusi n. The practical inconveniences which would result from the contrary ruling are forcibly put by Judge Comstock. But it is a fair criticism that these show the imperfection of the enactment and should be cured by legislation; while Chancellor Walworth's simple remark, "When the legislature declare that all contracts made by these associations *shall* be signed in a particular way, I am not prepared to admit that the court is authorized to say that a valid written contract may be made in a different form," may express a more sound position than that to which Judge Comstock is brought by his ingenious flanking movement.

Any words of restriction in the statute, declaring that contracts, otherwise executed, shall not be binding, of course avoid the entire controversy. But where such words do occur, or where the courts are unwilling to adopt the subtlety of Judge Comstock for the purpose of evading their meaning, the further question arises: to what contracts does the regulation apply? The technical language of the law might make the word contract cover every indorsement, every bill of exchange, and possibly even every check or draft which the cashier might be obliged to make or sign in the ordinary course of business. Every petty agreement occurring in the daily routine might come within its scope. The machinery of banking business, in its simplest parts, would become intolerably cumbrous. It is obvious that this could not have been the intent of the framers of such statutes; it is impossible to impute to them such folly. The courts have accordingly given a reasonable construction, and one somewhat more narrow than the ordinary broad technical one, to the word "contract," thus used. It has been held not to restrict the power of the cashier to draw, sign,

and indorse bills of exchange, drafts, checks, and the like instruments, since the power to do so is by the usage of business universally understood to be inherent in his office and has often been so declared by the courts.[1] Chancellor Walworth, in his opinion before referred to, also says, this phrase, "contract," does not, "of course, include a class of contracts that are never in fact made by the association, but which arise by operation of law merely; as, in the ordinary case of an implied *assumpsit* to repay moneys deposited by dealers with the bank. In such case, the certificate of the cashier or teller, or the entry in the pass-book of the customer, is not a contract; it is only evidence of a fact, which might be proved by parol, to raise an implied promise by operation of law."

One who has borrowed money from the bank cannot, after he has thus received the benefit of the contract, repudiate the obligation which it imposes upon himself, on the ground that the bank in making the loan exceeded its corporate powers, or acted otherwise improperly or illegally;[2] neither on the ground of any original informality or irregularity in the formation of the company under the law of its corporate existence.[3] Efforts of this nature to avoid the performance of their undertakings are usually based by debtors upon the infringement of clauses in the charter or organic law, which are so phrased or relate to such matters that the courts regard them as directory merely. These usually relate to the number of directors who shall have authority to make the loan; to the absolute amount, or the proportion of the capital stock, which shall not be exceeded in any individual loan; to the amount or kind of the security to

[1] Angell & Ames on Corporations, § 300; Merchants' Bank v. Central Bank, 1 Kelly, 418; Carey v. McDougald, 7 Geo. 84; Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326; Northern Bank of Kentucky v. Johnson, 5 Coldwell, 88; Jones v. Hawkins, 17 Ind 550; Allison v. Hubbell, id. 559.

[2] Parish v. Wheeler, 22 N. Y. 494; Smith v. Bank of the State, 18 Ind. 327; Bradley v. Same, 20 id. 528; Bank of Middlebury v. Bingham, 33 Vt. 621; Planters' Bank v. Sharp, 4 Sm. & Mar. 75.

[3] Allison v. Hubbell, 17 Ind. 559; Southern Bank v. Williams, 25 Geo. 534.

be taken, or to the manner in which it shall be taken; and other like concerns. The breach of these and similar provisions may subject the corporation to penalties at the process of the State authorities, but it does not avoid the contract which it affects.[1]

Discounting and Usury.

Banks are no more exempt than individuals from the operation of the usury laws. The solitary exception lies in the familiar fact, that in discounting they are permitted, by virtue of a long established and universal custom, to receive the amount of interest in advance, by holding it back at the time when they make the loan. Discounting is a part of the general business of banking, and could be done even without specific authority conferred in the incorporating act. The holding back of interest in advance is implied in the phrase itself; it is part of the definition of the word. But the bank, though it can thus secure a slight increase in the actual amount of money which it receives in payment for the use of its funds, can do it in no other shape and to no greater extent than precisely this. It may take not one particle more than the legal rate of interest, but it may keep this out of its payment at the time when it hands over the balance of the loan to the borrower. This is the meaning and the only meaning of the words "upon banking principles" or "according to banking principles and usages" sometimes appended to the word "discount" in charters and organic laws. The addition signifies nothing more than the word "discount" would alone imply, and is in fact mere surplusage.[2] It will not support the reservation of more than the legal rate of interest, upon the ground that this excessive rate is customarily reserved by all the banks

[1] See the cases cited in two next preceding notes; also Moreland *v.* State Bank, 1 Breese, 208; Bond *v.* Bank of Georgia, 2 Kelly, 92; Bates *v.* State Bank, 2 Ala. 451.

[2] Fleckner *v.* Bank of the United States, 8 Wheat. 338; McLean *v.* Lafayette Bank, 3 McLean, 587; Creed *v.* Commercial Bank, 11 Ohio, 489.

in the neighborhood.[1] Such a custom, if it were allowed to be proved, would be impotent to vary the distinct statutory enactment; but evidence to establish it is inadmissible.

Either the capital, or the capital and deposits, of the corporation, according to the regulations prescribed in the charter, may serve as the basis upon which loans and discounts may be made. Special deposits can never serve as such basis, or be included as a part of it. Even where the statutory phrase is "the moneys actually deposited for safe-keeping," it will be construed to mean only general deposits, and not to include any description of such as are in fact special.[2]

If the bank takes usurious interest, the effect upon the validity of the contract, and also in subjecting the bank itself to any penalty, will be governed by the ordinary law concerning usury, statutory and adjudicated, of the place. The results will differ in different States. In some, the contract will be wholly void; in others, it will be void only as to the illegal excess of interest; and in others again, it will be void altogether as to interest, but the principal sum will be recoverable. In any case, the law enacted by the legislature, or adopted by the courts having jurisdiction in the premises, concerning usurious contracts between individuals, will govern where either or both of the parties is a banking corporation. But greater difficulties have been experienced where the charter of the bank specifies the rate of interest which may be received. It has been urged, that if the bank is prohibited from entering into any contract whereby it is to receive more than a certain specified rate of interest, then any contract which it undertakes to enter into, in contravention of this rule, must be void, as being one which the corporation is absolutely forbidden, and therefore is absolutely powerless, to make. But, though this view seems in a measure plausible, yet it has not

[1] Niagara County Bank *v.* Baker, 15 Ohio St. 68; New York Firemen's Ins. Co. *v.* Ely, 2 Cow. at p. 707; Dunham *v.* Gould, 16 Johns. 367.

[2] Foster *v.* Essex Bank, 17 Mass. 479.

been sustained by the best authorities. Fleckner *v.* The Bank of the United States (*supra*) is a leading case on the subject, and the reasoning of Mr. Justice Story therein is satisfactory. The act of incorporation said, "Nor shall it [the bank] take more than at the rate of six per centum per annum for or upon its loans or discounts." Having first shown that the holding back of the amount of interest at the time of lending the money was not to be considered an infringement of this provision, Judge Story proceeded to say, "If indeed the law were otherwise, it would not follow that the transfer to the bank of the present note would be void, so that the maker of the note could set it up in his defence. The statutes of usury of the States, as well as of England, contain an express provision, that usurious contracts shall be void; and without such an enactment the contract would be valid, at least in respect to persons who were strangers to the usury. The taking of interest by the bank beyond the sum authorized by the charter, would, doubtless, be a violation of its charter, for which a remedy might be applied by the government; but, as the act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery." Such a clause in the incorporating act would seem therefore to be directory merely. Infringement of it may subject the bank to proceedings, perhaps for the forfeiture of its charter, by the proper governmental authorities. But the contract itself, which is tainted with the disobedience, will not be void *in toto*, since the law, in order to have this effect, should have expressly so declared. It may be stated, as a rule of interpretation of such interest clauses in incorporating laws, that they will be construed in accordance with the analogy of decisions rendered under statutes of usury, similarly phrased. If the language expressly declares what shall be the effect of taking an illegal rate of interest, the matter is, of course, thereby put beyond the possibility of discussion. But if the language is simply confined to the expression

of the prohibition, stating what "shall not" be done, without more, then the law asserted by Judge Story must be regarded as established. Indeed, very little desire to depart from it has ever been manifested.[1]

The case cited below, from 9 Peters's Reports, draws a fine distinction in phraseology, which ought, perhaps, to be noticed in this connection. The cause is first reported in 2 Peters, 527, and there, in respect to interest, the word "reserving" is declared to be included in the word "taking." So that whatever consequences are declared to attach to the "taking" illegal interest must attach likewise to the "reserving" it. But, in the second decision, the court reverse this conclusion, and declare that reservation is quite a different thing from a taking, and may entail entirely different results in its effect upon the contract. If the statute enacts that "reserving" shall avoid the transaction, it does not therefore follow that "taking" will also avoid it; and *vice versa*. The point is certainly a very subtle one, but it is carefully defined and strongly asserted by the court. It introduces another element of complication into a matter which certainly needed no such addition to its former difficulties.

If a bank undertakes to remit to, or to collect in, a distant place, it has a right to charge a reasonable sum to cover the rate of exchange, and the labor and risk to which it may be put. Such a charge, though in the form of a percentage, is not interest, and is not usurious. But it must be made *bona fide*. If the charge for labor or risk is excessive, or if charges are made for exchange when the bank is not really obliged to pay any thing on this account, or if credit is not given for ex-

[1] See also, Bank of United States *v.* Waggener, 9 Pet. 399; Bandel *v.* Isaac, 13 Md. 202; Farmers' Bank *v.* Burchard, 33 Vt. 346; Rock River Bank *v.* Sherwood, 10 Wis. 230; Bank of Middlebury *v.* Bingham, 33 Vt. 621; Planters' Bank *v.* Sharp, 4 Sm. and Mar. 75; *contrà* Bank of Wooster *v.* Stevens, 1 Ohio St. 233. See also Orr *v.* Lacey, 2 Dougl. 252; but in examining all the cases special attention must be paid to the precise wording of the enactments under which they arise.

change where, nevertheless, the bank actually receives something on account of it; then the form of the charge will be regarded as only colorable, and it will be considered that usurious interest has been taken or reserved.[1]

Power to discount notes is not power to purchase them. The right of purchasing is an entirely distinct and independent one, which may or may not be enjoyed by any bank, according to the circumstances of its particular case and the language of its incorporating act. If possessed, it is simply a right to buy the notes in the market for their fair market value, whatever that may be. It must be a *bona fide* transaction of bargain and sale. If it be colorable only, and resorted to for the purpose of covering up an usurious dealing, it will be treated as an usurious contract.[2]

A note taken by a bank, in payment of a pre-existing debt, is not discounted, within the meaning of that phrase in a statute which prohibits the discounting of notes unless they bear the names of two responsible parties or are accompanied by collateral security.[3] Payment to the borrower of the amount of the loan in bills of a bank, which are circulating at less than their par value, is usurious.[4]

Forfeiture of Franchise.

An act or omission, in order to furnish ground for proceedings to take away the corporate franchise, must be the act of the corporation itself. Cases might arise in which the act or omission of the share-holders, as a body, could have this effect. Ordinarily, however, the law regards the board of directors as constituting the body corporate for all matters of this descrip-

[1] Bank of the United States *v.* Davis, 2 Hill, 451.

[2] See Fleckner *v.* Bank of the United States, 8 Wheat. 338; Talmadge *v.* Pell, 8 Seld. 328; Dunkle *v.* Rennick, 6 Ohio St. 534; McLean *v.* Lafayette Bank, 3 McLean, 587; Philadelphia Loan Co. *v.* Towner, 13 Conn. 259.

[3] Lime Rock Bank *v.* Hewett, 52 Maine, 531.

[4] Bank of the State *v.* Ford, 5 Iredell, 692.

tion. The fault must accordingly be theirs, either directly or by legal implication. Otherwise it will not be the act of the bank, and will not be a cause of forfeiture. Thus, if a cashier or teller, although acting within the scope of his allotted functions, commits a breach of the organic law, this fact alone is not sufficient to cause a forfeiture. On the contrary, it will be presumed that he alone and individually, of his own motion, is guilty of the misdoing. But, if the contrary be affirmatively shown, and if it be actually proved that the directors ordered, or knowingly permitted or ratified, the illegal act, then it remains no longer the act of the individual officer, but becomes the act of the bank, and as such furnishes ground for the process for disfranchisement. It is only when the act of the subordinate is rendered by the attendant circumstances, in the view of the law, the act of the principal, that is to say, of the board of directors, or of the bank itself, that the principal will be deprived of its corporate existence by reason of it.[1] Upon whom the burden of proof rests, whether with the prosecution to show that the act of the officers was in fact the act of the bank, or with the bank to show the contrary, is a point which we have nowhere found discussed or decided. It is not improbable, that in any particular case, it might depend somewhat upon the nature and aspect of the act itself; and according as these presumably pointed to the directory or only to the officer as the origin of the transaction, the *onus* might be shifted to the one side or the other. If, however, a rule of general application is demanded, the directors or bank may claim the benefit of the presumption of innocence. They have chosen an officer to perform certain necessary and legal duties; it is not to be presumed that they have directed or authorized or knowingly permitted him to perform an illegal act. What liability they may be placed under to an innocent third party by his so doing is an entirely different question from that of

[1] Clark *v.* Metropolitan Bank, 3 Duer, 241; State *v.* Commercial Bank, 6 Sm. & Mar. 218, and cases cited.

their liability to disfranchisement, incurred to the State. But, strong as is this argument, it might possibly be considered to be sufficiently met by the practical aspect of the matter. A servant acting in his employment, and assuming to act according to his employment, is guilty of an illegal action. It is in the great majority of cases a severe hardship, often rising to an impossibility, for the prosecution to prove the authorization and responsibility on the part of the principal, even if such really exist; whereas the negative proof can seldom if ever be beyond the easy reach and control of the directors. Arguments of this description are sometimes allowed to prevail, and it is not often that they seem to be more weighty than in cases like those here supposed. In the absence of direct judicial authority, the point must be regarded as open.

Generally, it may be said that any violation, wilfully or knowingly committed, of any material direction or provision embodied in the law of the corporate existence; or any fraudulent or dishonest act; or the occurrence of any thing which shows that for any reason, whether of fault or misfortune, the bank is incompetent in any respect to perform safely and usefully any of its functions, will furnish sufficient ground for taking away the corporate franchise.[1] Specific cases which have arisen in various States may be given, by way of illustration, as follows: The making loans to the directors before the share-holders have passed by-laws concerning this matter;[2] refusal to transmit a statement of the condition of the bank, required by law to be made to a government official;[3] excessive loans to directors, though no by-law exists in reference thereto;[3] the making of a note to the bank, without consideration and merely colorably, which the bank receives for the purpose of making its assets appear greater;[4] non-user or

[1] See State Bank v. State, 1 Blackf. 270.
[2] Conant v. Seneca County Bank, 1 Ohio St. 298.
[3] State v. Same, 5 Ohio St. 171.
[4] Agricultural Bank v. Robinson, 24 Maine, 274.

misuser of the franchise;[1] wilful taking of illegal interest.[2] Whether or not suspension of specie payments will work a forfeiture is a question which has in different States been differently decided.[3]

But matters which are a cause of forfeiture of charter cannot be set up and tried in collateral proceedings. There must be direct process, instituted by the government, in which the defence, excuse, or explanation of the bank will be heard, and the distinctive question will be judicially passed upon, free from the complication of any other parties, issues, or interests.[4]

Legislative Continuance of Corporation.

The corporation may be continued in existence by virtue of an act of legislature, equally whether the act is passed before or after the expiration of the charter limitation. The bank will be revived by the act passed after the expiration in every respect as the same corporation which it was before; and will be in no respect affected by the break in continuity. This is the unquestionable effect of a simple act of continuance or revival. But whether the act is in fact one of continuance and revival of the old corporation, or is the creation and institution of a new one, is a question of great importance. No general rule can be laid down for determining it, inasmuch as it depends in each case upon the intent of the legislators, as the same is judicially gathered and construed from the terms of the enactment. The statute will always be conclusive. The acts and

[1] People *v.* Hudson Bank, 6 Cow. 217; Same *v.* Niagara Bank, id. 196.

[2] Commonwealth *v.* Commercial Bank, 28 Penn. St. 383.

[3] It will not in Ohio; State *v.* Commercial Bank, 10 Ohio, 535. It will in Virginia; Planters' Bank *v.* State, 6 Sm. & Mar. 628; 7 id. 163, though whether or not it would do so, if it were only temporary, is a *quære* in the same case. It will in South Carolina; State *v.* Bank of Carolina, 1 Speers, 433. Apparently also in Georgia and Mississippi; Robinson *v.* Bank of Darien, 18 Geo. 65; Maury *v.* Ingraham, 28 Miss. 171.

[4] Grand Gulf Bank *v.* Archer, 8 Sm. & Mar. 151; Receivers of Bank of Circleville *v.* Rennick, 15 Ohio, 322.

conduct of the directors, which can possibly amount to nothing more than the expression of their construction of the act, will not be allowed to alter the true legal meaning and effect thereof, as the same shall appear to the judges. The enactment has either continued an old corporation or it has made a new one. Whichever it has done, it has done absolutely and irrevocably, and beyond the possibility of modification or change by the words or deeds of the directors, who hold their office under and in subjection to it. But there is an important distinction between the two cases; for, if there is a continuance, the corporation succeeds to both the rights and the liabilities existent at the time of the taking effect of the act. But if there is a new corporation, it succeeds neither to the rights nor to the liabilities of its predecessor, with which, and with whose affairs, assets, or debts it has no more to do than if it were any other bank in the country. It makes no difference that the name is the same, that the place of business is the same, that the officers and share-holders, or the majority of them, are the same. The combination of these elements proves nothing; for if the arbitrary statute has created a new corporation, new and therefore wholly independent, it is, and must be, however close and perfect may be the similarity between it and any predecessor. In such case there is similarity only and not identity. Indeed, the traits of similarity are not properly even competent evidence to prove identity. For whether or not there is identity is purely a question of statutory phraseology.[1]

[1] Lincoln and Kennebec Bank *v.* Richardson, 1 Greenl. 79; Foster *v.* Essex Bank, 17 Mass. 479; Bellows *v.* Hallowell and Augusta Bank, 2 Mason, 81; Wyman *v.* Same, 14 Mass. 58.

CHAPTER II.

DEPOSITORS AND CUSTOMERS.

It is of the essence of the business of banking that the bank or banker should receive on deposit the money and funds of other persons. In receiving deposits and opening accounts the bank is free to choose whom it will as customers, from among those that offer. No duty exists on the part of the bank towards the public akin to that which binds common carriers to take every person who requests them to do so and who is in a fit condition to be taken, or that which obliges hotel-keepers to admit any applicant as a guest. The bank may select arbitrarily, and cannot be held accountable to any person for the propriety of its action in this matter.[1] The receiving a deposit from a person, without explanation or understanding to the contrary, at once and without more makes that person a customer of the bank. But no implied undertaking to allow him to continue so for any length of time exists. Neither is he under any obligation to continue so. The relationship may be dissolved at any time by either party, saving the then existing liens and rights of each.

Relation of the Customer on a simple Deposit Account.

The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and creditor at common law. The original and every subsequent deposit by the

[1] Thatcher *v.* Bank of State of New York, 5 Sandf. 121.

customer is in strict legal effect a loan by the customer to the bank, and *e converso* every payment by the bank to, or on account of, the customer is a repayment of the loans *pro tanto.* Wherefore it follows that the customer can never hold or charge the bank as a trustee, *quasi* trustee, factor, or agent. The bank may of course assume any of these functions, and in fact it often does so; but they are all nevertheless wholly outside of its ordinary legal relationship to the depositor. Efforts have been made to hold banks to the duties and responsibilities of trustees in respect to the sums placed on deposit with them, also to hold them as agents of the depositor, but these have uniformly failed both in England and in the United States; and the general doctrine as laid down above is sustained by a great weight of authority.[1]

All the sums paid into the bank on general deposit, by the same or different depositors, form one blended fund.[2] So soon as the money has been handed over to the bank, and the credit given to the payer, it is at once the proper money of the bank.[3] It enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor has only a debt[4] owing him from the bank; a chose in action,[5] not any specific money, or a right to any specific money. It follows that the act of deposit having been once consummated, nothing short of pay-

[1] English cases: Foley *v.* Hill, 2 H. L. Cas. 39; Crosskill *v* Bower, 32 Beav. 86; Carr *v.* Carr, 1 Meriv. 541 n.; Bishop *v. Countess* of Jersey, 2 Drew. 143; Devaynes *v.* Noble, 1 Meriv. 541; Bellamy *v.* Majoribanks, 8 Eng. Law & Eq. 517; Sims *v.* Bond, 5 Barn. & Ad. 392; 2 Nev. & Man. 608; Watts *v.* Christie, 11 Beav. 546; Pott *v.* Clegg, 16 M. & W. 321; Grant on Bankers and Banking, pp. 113–118. American cases: National Bank *v.* Eliot Bank (in which, however, there is a long dissenting opinion, delivered by Abbott, J.), 20 Law Rep. 138; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94; Bullard *v.* Randall, 1 Gray, 605; Chapman *v.* White, 2 Seld. 412; Downes *v.* Phœnix Bank, 6 Hill, 297; Foster *v.* Essex Bank, 17 Mass. 479; Bank of Northern Liberties *v.* Jones, 42 Penn. St. 536; Marsh *v.* Oneida Central Bank, 34 Barb. 298 (citing many authorities); Curtis *v.* Leavitt, 15 N. Y. 9.

[2] Devaynes *v.* Noble, 1 Mer. 541; Bodenham *v.* Purchas, 2 Barn. & Ald. 39; Henniker *v.* Wigg, 4 Q. B. (Ad. & El.) 792; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94.

[3] Foley *v.* Hill, *ubi sup.* [4] Ibid. [5] Chapman *v.* White, *ubi sup.*

ment on the part of the bank, or some act of the depositor himself, will suffice to exonerate it from the indebtedness it has assumed. The identical bag of coin or roll of bills in which the deposit was made may be stolen, before it has been in any practical manner commingled with the funds of the bank; it may be embezzled or fraudulently misapplied by an officer of the bank, still the indebtedness of the bank subsists, entirely unaltered by these circumstances. Neither the intentional nor the accidental separation of the specific moneys will enable the bank to follow them and to affect its customer with their fate.[1]

The various items of deposit with and payment by the bank form a running account between the bank and the customer. For any indebtedness accruing from the customer to itself, the bank has the right of set-off. So at any time it is only the balance of all the items up to that date that the customer can recover from the bank, or for which he can draw his checks upon it. It is the first item on the debit side that is discharged or reduced by the first item on the credit side, without regard to the identity or disparity of any particular sums.[2] Simple as this principle appears it is sometimes the only thread which can show the way out of complicated labyrinths, as is well shown by the cited case of Devaynes *v.* Noble. There the partner in a large banking house died. The business was continued without any real or even formal change. Some customers knew of the death; some did not. The daily course of the business continued in all respects as before, till the house failed. Then various customers sought to hold the estate of the deceased partner to satisfy their deficits. The question was, on what principle the accounts should be made up, — for no hesitation was expressed as to the necessity of subjecting the estate to meet the unsatisfied claims of all persons who were

[1] Concord *v.* Concord Bank, 16 N. Hamp. 26; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94.

[2] Ibid. Devaynes *v.* Noble, Bodenham *v.* Purchas, Henniker *v.* Wigg, *ubi supra.*

customers at the time of the death of the deceased. Since then some had increased, and others had decreased, the amount of their deposits; members of each of these classes had received credits to the amount of their balances at the time of the death; other members had not. The arguments of counsel were very long and ingenious; the court gave the matter the most serious consideration, but regarded no solution as possible save that of a simple running account: it decreed that every payment made to each customer since the death should be applied in reduction of the debt or balance owing to that customer at the time of the death, and this equally (1) where the customer had since made no deposit, but simply drawn checks; (2) where the customer had continued to deal with the firm, depositing and checking, but on the whole increasing his balance; and (3) where, dealing in like manner, he had decreased his balance. The principle was stated to be unalterable that each payment to the customer should be referred back and set against the earliest indebtedness to him; that the rule of law, sometimes laid down, that if at the time of the payment the debtor neglects to appropriate it, the creditor may afterwards appropriate it to suit his own wishes, cannot be allowed to govern in cases of banking; where, in the absence of express contemporary arrangement or understanding, it will be considered that the appropriation of each payment to the discharge of the earliest then subsisting indebtedness is in fact made by the very act of setting down the two items in their order in the account.

But though the items constitute a running account, yet it is not of such a nature that a bill in equity for an accounting will lie. At any time the simple striking of a balance between the two columns of debits and credits will show a sum which is a simple debt; so that there is in fact no ground on which an accounting can be demanded in equity. An ordinary action of debt will lie on behalf of the depositor, and if the bank answer payment or discharge it is matter of common law, where the

remedy for either party is perfect. Neither, as has been stated, is there a fiduciary relation of any nature whatsoever between the parties which could justify recourse to equity. Suit will lie on the common money counts. This has been conclusively settled by the sound decision, given in the House of Lords in the case of Foley *v.* Hill, *supra.*

Obligation of the Bank to Honor Checks.

The bank is under the obligation of honoring the customer's drafts and checks whenever the same are presented for payment, provided that at the time of such presentment the balance of the account, if then struck, would show a credit in favor of the customer sufficient to meet the sum called for by the check or draft. The contract so to honor the depositor's orders is implied from the usual course of business. The deposit is made with the tacit understanding that the bank shall respond to the depositor's orders, so long as there is sufficient balance to his credit.[1] Such an order is almost always expressed in writing, by check or otherwise. But there is no absolute necessity for this. A verbal direction from the customer to the bank to pay a sum or to transfer a credit, would fully justify the bank in so doing. If the bank itself is willing to act upon verbal orders, they would be a perfect defence to a suit by the depositor for the amount transferred under them. But though the bank may, if it chooses, act upon such directions, it is under no obligation to do so; by the usages of the banking business it is entitled to demand some written evidence of the order.[2] So too the customer may draw out his funds in such parcels as he may see fit, both as regards number and amount. The rule of law forbidding a creditor to split up his demand does not affect this principle, which is based upon a custom of

[1] Downes *v.* Phœnix Bank, 6 Hill, 297; Marzetti *v.* Williams, 1 Barn. & Ad. 415; Watson *v.* Phœnix Bank, 8 Met. 217.

[2] Watts *v.* Christie, 11 Beav. 546; Coffin *v.* Henshaw, 10 Ind. 277; Walker *v.* Bostron, 9 M. & W. 421.

the banking business that has been well said to be so ancient, unquestioned, and well known that courts will take judicial notice of it, without proof.[1] But in the case cited of Chicago Ins. Co. *v.* Stanford, the court said that if there should be a dispute between the bank and the customer, and the latter should draw a multitude of checks, not in the ordinary course of *bona fide* business, but for the purpose of vexation and of bringing a proportionate number of suits against the bank, then the court would apply itself to find some remedy. In England it was until lately contrary to law to draw a check for less than 20*s.*; but by a recent statute a check for any sum may be legally drawn, if it be *bona fide* against funds of the drawer actually in the hands of the banker. In our own country the law sets no limit whatsoever, and annexes no conditions; though it has been said that a check drawn for more than the depositor's balance, or against a bank wherein the drawer neither has, nor has reasonable grounds to expect forthwith to have, funds, is, if unexplained, a fraud.[2]

As it is the duty of the bank to pay its customer's checks, when in sufficient funds on his account so to do, equally it is its duty to pay his bills, notes, and acceptances, drawn on, or made payable or negotiable at, the bank. For it is a presumption of law that if a customer does so draw upon, or make payable or negotiable at, his bank any of his paper, it is his intent to have the same discharged from his deposit. It is his order to pay, equally with his check, and if the bank pays, without express orders to the contrary, it shall be protected in so doing and it shall be a good defence to a suit by the depositor. Nay, it has been said, that if the bank refuses to pay it shall be liable in damages, in like manner as for its refusal to pay the check of a customer when in funds sufficient to do so. But in case of its refusal to pay an acceptance the writ shall lie in favor of the

[1] Munn *v.* Burch, 25 Ill. 35; Chicago Ins. Co. *v.* Stanford, 28 id. 168; Byles on Bills; * 21; Sharswood's note. (Sharswood's Ed.)

[2] True *v.* Thomas, 16 Me. 36.

acceptor only, and not in favor of the drawer, for it is to be supposed that the acceptor provided the funds, and further it would seem that at any rate the payment could be properly made only from his funds, since it was at least *prima facie* his duty, and not the drawer's, to supply the means of payment.[1]

Statute of Limitations.— Suit by Depositor for his Balance.

The indebtedness of the banker, being an ordinary indebtedness at common law, the Statute of Limitations will run against it, as against any other simple debt. But when the statute will begin to run has not been as yet definitively settled. In The Union Bank *v.* Knapp,[2] it was said that the statute would begin to run from the date of the last balancing of accounts, as in the depositor's bank-book, if no subsequent transactions should be had between the parties. This is the strict corollary from the rule that the bank's liability to the depositor is a simple debt. But it seems to us that this calculation, from the date of the last transaction between the parties, is not founded either in reason or in sound law. Viewing it practically, the longer the bank retains the money undisturbed the better it is for the bank. This cannot be predicated of ordinary claims between persons generally; but the banking business finds a great portion of its profit, in many cases all its profit, in the use of the funds of other persons. If it has been allowed to reap extraordinary gains from the funds of one man, because it has been allowed to retain them undisturbed for the unwonted space of eight, ten, or twelve years, this would seem to be no just cause for allowing it to add the still more enormous gain of a complete appropriation of the whole sum. If the business of the institution or firm is properly conducted,

[1] Thatcher *v.* Bank of State of New York, 5 Sandf. 121; Griffin *v.* Rice, 1 Hilt. 184; Mandevile *v.* Union Bank, 9 Cranch, 9. In this last case it was held that a bank was authorized to *advance* on the drawer's account the money called for by his bill or draft.

[2] 3 Pick. 96. See also Pott *v.* Clegg, 16 Mee. & W. 321.

the depositor's draft for his principal, or any part of it, could never operate as an injurious surprise, as it might so probably do between other persons. Such seems clearly to be the fair reason of the matter. The legal arguments and authorities which sustain it seem to us, of themselves, conclusive. The rule of the case above mentioned can be based only on the assumption that the contract is a perfectly simple one of unqualified indebtedness. But this is not so. We have already seen that it is a contract specially modified by the clear legal understanding that the money shall be forthcoming to meet the order of the creditor whenever that order shall be properly presented for payment. It follows, therefore, that this demand for payment is an integral and essential part of the undertaking, it may be said, even of the debt itself. In short, the agreement of the bank with the depositor, as distinct and valid as if written and executed under the seal of each of the parties, is only to pay upon demand; accordingly, until there has been such demand, and a refusal thereto, or until some act of the bank has dispensed with such demand and refusal, the statute cannot begin to run, no presumption of payment can arise. The decisions in New York and Pennsylvania fully support these views.[1] In Maryland, the same result is obtained through a ruling based upon banking usage.[2] Further, in the case of a naked debt, the statute never begins to run before a right of action on behalf of the claimant or creditor has accrued. If this be a sound principle, it is conclusive of the present question. For debt though it be of the bank to the depositor, it is not such a naked debt that it can be sued upon by the depositor at any moment. The authorities are numerous and overwhelming that the depositor's right of suit does not exist until after he has made a demand upon the bank,

[1] Planters' Bank *v.* Farmers' & Mechanics' Bank, 8 Gill & J. 449; Farmers' and Mechanics' Bank *v.* Planters' Bank, 10 id. 422; Girard Bank *v.* Bank of Penn Township, 39 Penn. St. 92.

[2] Planters' Bank *v.* Farmers' & Mechanics' Bank, 8 Gill & J. 449.

which there was an implied understanding between them in the outset that he should make,[1] or until some act of the bank has waived such demand.[2] The duties of demand and of payment are reciprocal. Surely then the legal results of these rights should be reciprocal likewise. If the depositor cannot sue till he has demanded payment, *e converso* he should not lose his right to sue till the payment has been refused; for until that time he has a right to suppose that the original agreement between himself and the bank, which was entered into for their mutual advantage and profit, and from which his refraining from demand is enabling the bank to reap an unusually great advantage and large profit, is still subsisting in unbroken force.

The acts which have been held to waive demand by the depositor are: 1. Notification to him by the bank that his claim will not be paid.[3] 2. The rendition to him by the bank of an account, in which it claims the money as its own.[4] 3. Suspension of specie payment and discontinuance of banking operations by the bank, with knowledge thereof by the depositor.[5] 4. Suspension of payment and closing the doors of the bank.[6]

In Adams *v.* Orange County Bank,[7] the publication of a list of unclaimed deposits, made under the State statute requiring such publication at certain intervals, was held to be an acknowledgment of indebtedness to the depositors therein named, from which a new promise could be implied to pre-

[1] Downes *v.* Phœnix Bank, 6 Hill, 297; Adams *v.* Orange Co. Bank, 17 Wend. 514; Johnson *v.* Farmers' Bank, 1 Harring. 117; Girard Bank *v.* Bank of Penn Township, 39 Penn. St. 92; Union Bank *v.* Planters' Bank, 9 Gill & J. 439; Watson *v.* Phœnix Bank, 8 Met. 217.

[2] Farmers' & Mechanics' Bank *v.* Planters' Bank, 10 Gill & J. 422; Bank of Missouri *v.* Benoist, 10 Mis. 519; Planters' Bank *v.* Farmers' & Mechanics' Bank, *ubi sup.*; Cooper *v.* Mowry, 16 Mass. 7.

[3] Farmers' & Mechanics' Bank *v.* Planters' Bank, *ubi sup.*

[4] Bank of Missouri *v.* Benoist, *ubi sup.*

[5] Planters' Bank *v.* Farmers' & Mechanics' Bank, *ubi sup.*

[6] Cooper *v.* Mowry, *ubi sup.*

[7] 17 Wend. 514, *supra.*

vent the rnnning of the Statute of Limitations; and the court added that it would seem that if facts existed, excusing payment, they should be noticed in such publication, or otherwise should be deemed to have been waived.

Lien of Bank on Funds of Depositor.

The rule may be broadly stated, that the bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account.[1] Of course, so long as the balance is in favor of the depositor, the lien has no vitality in it. But when payment upon an overdraft, a discount, an acceptance, or other species of advance or loan by the bank to him creates an indebtedness on his part, all the funds which the bank has to his credit may be applied upon such indebtedness until it is fully discharged.

The funds thus applicable have been said to be not alone the general deposit of the customer, but any business paper, as notes or bills, belonging to him and which he has intrusted to the bank for collection. But in this broad form the statement is hardly correct.

Upon precisely what property of the customer in the possession of the bank the lien will attach is a subject upon which there have been but few decisions in America. In England, where persons possessed of an independent property are wont to place many things of value in the custody and charge of their bankers, in a manner not so much practised in the United States, the decisions have been numerous. In Bank of United States *v.* Macalester (*supra*) the

1 Ford *v.* Thornton, 3 Leigh, 695; State Bank *v.* Armstrong, 4 Dev. 519; McDowell *v.* Bank of Wilmington, 1 Harring. 369; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94; Dawson *v.* Real Estate Bank, 5 Pike, 283; Bank of United States *v.* Macalester, 9 Barr, 475; Beckwith *v.* Union Bank, 4 Sandf. 604; Marsh *v.* Oneida Bank, 34 Barb. 298; Davis *v.* Bowsher, 5 Term, 488; Jourdaine *v.* Lefevre, 1 Esp. N. P. 66; Bolton *v.* Puller, 1 B. & P. 539; Giles *v.* Perkins, 9 East, 12; Scott *v.* Franklin, 15 East, 428; Grant on Bankers and Banking, 279, citing Brandao *v.* Barnett, 12 Cl. & F. 787; Jones *v.* Peppercorne, 5 Jur. N. S. 140; 28 L. J. Ch'y, 153.

general rule was laid down that funds deposited in a bank for a special purpose, known to the bank, cannot be withheld from that purpose, to the end that they may be set off by the bank against a debt due to it from the depositor. Accordingly, certain coupons of the State bonds, issued by the State of Illinois, having been made payable at the Bank of the United States, and funds to precisely the amount necessary to meet these coupons having been deposited by the State in the bank just before they fell due, it was held that the bank, understanding the purpose of the deposit, could not refuse to apply the money to the payment of the coupons on the ground of a prior undischarged indebtedness of the State to the bank. The same general rule is laid down by Grant in his English Treatise, p. 273. He says that the claim of a general lien by the bank would be inconsistent with its special undertaking. The reasoning in the above case, however, and that in Mr. Grant's work, both tend to show, though it is not directly stated, that if the deposit were so made that the bank did not, as matter of fact, know, or at least did not have such strong cause that it could not reasonably insist that it did not know, that the deposit was intended to meet the special purpose, and that it could not therefore be subjected to the lien, then the lien might attach. For if the bank had not such knowledge, or ample means of obtaining such knowledge, it may be well urged, that with an unpaid indebtedness of the customer to the bank already subsisting, it would refuse to have further dealings with him, if they were to be of such a qualified and unusual nature.

The English cases seem to be generally soundly decided, and would doubtless be regarded as sufficient precedents to lead the decisions upon similar points in this country. We shall therefore select such of them as are likely to prove of interest. A customer's security, specifically stated to be for the amount "which shall or may be found due on the balance

of his account," was held to be security for the then existing balance only, and not to be applicable upon the subsequent floating balance.[1] In like manner, a security given for a contemporaneous advance of one thousand pounds by the banker, was held not to be applicable against an indebtedness of five hundred pounds, afterwards arising upon the ordinary running account.[2] It seems, too, that the deposit should not be in the nature of a special deposit. Thus, for example, a chest of plate, confided to the banker for safe custody, was held not subject to the lien.[3] Neither will the lien attach on securities left with the banker by mistake or casually; as where they were delivered as part of an application for a loan, for which they were expected to serve as security, but which he refused to make.[4]

Neither shall the banker have his lien upon property subject to a trust, and improperly left with him, or pledged to him, by the trustee, without notice of the trust; unless, indeed, the *cestui que trust* shall have done some act or been guilty of some negligence such as to deprive him of his counter rights.[5] But if the trust property consist of bills or notes, payable to bearer, or other property transferable by delivery merely, and be not ear-marked as trust property, if the customer deposit them as if they were his own, and the banker receives them in due course, *bona fide*, and with no notice of the trust, he shall hold them under his lien.[6] Though it has been held, that if A. delivers promissory notes to B., to get discounted for him, and B. takes them to his own banker for that purpose, who insists on placing them to the credit of B., B.'s account then

[1] *In re* Medewe, 26 Beav. 588; 28 L. J. Ch'y, 891.

[2] Vanderzee *v.* Willis, 3 Brown C. C. 21; Zinck *v.* Walker, 2 W. Bl. 1154.

[3] Grant on Bankers and Banking, 274, citing *Ex parte* Eyre; 1 Ph. 235; Brandao *v.* Barnett, 12 Cl. & F. 809; O'Connor *v.* Majoribanks, 4 Man. & G. 435.

[4] Lucas *v.* Dorrein, 7 Taunt. 279.

[5] Grant on Bankers and Banking, 274, *et seq.*; Manningford *v.* Toleman, 1 Coll. 670; Stackhouse *v.* Countess of Jersey, 30 L. J. Ch'y, 421.

[6] Grant on Banking, 280; Barnett *v.* Brandao, 6 M. & G. 630, also late Mass. c.

showing a balance against him, equity would still compel the banker to account to A.[1]

The bank may set off the balance of the depositor against any one out of several debts owing to it by him, at its own option, at least in cases where he has not signified his express election to appropriate it to meet some particular claim.[2] Whether the bank might not be considered entitled to the same privileges, unless in extraordinary circumstances, even where the customer sought to make an appropriation injurious to the bank, may be fairly questioned. It has never been decided.

The lien of the bank does not attach until some indebtedness is actually in existence. Thus, a bank holding a note of a depositor, has no right of set-off, and no valid lien before the note matures; so that it has been held, that if, in the interval before the maturity, the depositor makes an assignment of his funds, without the knowledge of the bank, but otherwise legal, the amount of his balance will pass to the assignee.[3] This is at strict law. But it would seem that in equity the bank might have a safeguard. The case has arisen where a depositor's note had been discounted by the bank; before its maturity he died; at the time of his death the amount of his deposit exceeded the amount of the note; by a court of equity it was held, upon application by the bank, and proof of danger of the insolvency of his estate, and also of the indorsers on the note, that equity would allow the bank to retain enough of the deposit to meet the note; though, it was said, in law the debt *in futuro* could not be set off against the debt *in præsenti*.[4] The sound justice of this is obvious. For it is certain that

[1] Grant on Banking, 280; Lord Bolingbroke's Ca. in Joy *v.* Campbell, 1 Sch. & L. 346.

[2] State Bank *v.* Armstrong, 4 Dev. 519.

[3] Giles *v.* Perkins, 9 East, 12. (Per Ld. Ellenborough.) Beckwith, *v.* Union Bank, 4 Sandf. 604, is sometimes cited to the same point; but it is not a very satisfactory authority.

[4] 3 Leigh, 695.

bankers will often make loans and discounts to a good customer, whose balance, though constantly shifting, is generally good, with the fair expectation that, in the ordinary course of dealing, they will in time have funds enough come to their hands to secure them against loss. If the debt be mature at the time of the debtor's death, the bank has the right of set-off as against the heirs, executors, and administrators of the deceased, whether the estate be solvent or insolvent, precisely as it would have enjoyed the same right against the customer himself in his lifetime.[1]

A bank, holding a note of a depositor, is under no obligation to appropriate a sum sufficient to meet it from his funds on deposit, immediately upon its maturity, or indeed at any other particular time; they may let the account run on, and take the chance that they will not lose in the end. They are, however, at liberty at any time after maturity to make such appropriation, especially if the depositor seeks to withdraw his funds, or so much of them as not to leave a balance equal to the amount of the note. Whether or not they could charge interest for the period during which their own neglect has allowed their debt to remain uncollected is a question which has never been passed upon. Probably they could do so. For ability to collect by a seizure of the debtor's funds is by no means equivalent to payment or discharge, and is not a thing which they are under any obligation to him to do. In the case cited below, the note had been put in judgment, without any previous effort by the bank to pay it from the depositor's balances, and it was held, that the judgment might still be set off by the bank.[2] It could be held to lose nothing because it chose to waive a lien and proceed like any ordinary creditor. It is objectionable as a hardship upon the debtor, but it is apparently a strict legal right of a bank holding a depositor's note, and sufficient of his funds to meet it at or after maturity, to refrain from applying

[1] State Bank *v.* Armstrong, 4 Dev. 519.

[2] Marsh *v.* Oneida Bank, 34 Barb. 298.

these funds to this purpose, and to put the note in suit. Upon the other hand, however, there is certainly the possible argument, that it is the duty of a bank holding a note of its depositor to pay it from his funds on deposit at maturity. And it has been decisively and properly held, that the neglect of the bank to do so would discharge the indorsers and sureties.[1]

The lien and the right of set-off only exist where the individual, who is both depositor and debtor, stands in both these characters alike in precisely the same relation and on precisely the same footing towards the bank. That is to say, for instance, the bank can claim no lien on the deposit of a partner, made on his separate account, in order to set off the same against a debt owing them from the firm;[2] and this not even if property specifically pledged to the bank by the partner on his separate account, afterwards becomes the property of the firm. Even then, if the firm fails, the banker can hold the property thus pledged solely as security for any separate indebtedness of the individual partner.[3] Neither can the individual partner and the firm so shift their respective credits and debits as to set them off, the one against the other, when the bank itself is insolvent.[4] In like manner, the joint and several note of A. as principal, and B. and C. as sureties, cannot be paid out of the individual deposit even of A.[5] In the first of the three cases cited in this paragraph, the facts were these: The bankers stopped payment, being at the time indebted to A., but having a balance due to the firm of A. and B. Before they had actually committed an act of bankruptcy, A. assigned his credit to the firm, and notified the bankers. But it was held that the assignment could not be legally made. In short,

[1] McDowell *v.* Bank of Wilmington & Brandywine, 1 Harring. 369; Dawson *v.* Real Estate Bank, 5 Pike, 283.

[2] Watts *v.* Christie, 11 Beav. 546.

[3] *Ex parte* McKenna, 30 L. J., Bank'cy, 20, cited in Grant on Bankers and Banking, 281.

[4] Watts *v.* Christie, 11 Beav. 546; 26 L. J. Ch'y, 711.

[5] Dawson *v.* Real Estate Bank, *ubi sup.*

it may be laid down as a general rule, based upon and illustrated by many of the cases cited and commented upon in this and the immediately preceding paragraphs, that if a customer has any duplex relationship with his banker, the line of demarcation shall be carefully preserved. If he borrows a specific sum, and gives specific security for it, all transactions relating thereto shall be kept accurately distinct from the transactions growing out of his ordinary connection with the bank, as a simple depositor.[1] If he deals with them as an individual, and also as a member of a firm, his dealings in these respective characters shall not be in any manner intermingled. If the customer gives a bond to the bank, generally, though he often has general deposits equalling or exceeding the amount of such bond, yet the bank is not bound to apply them in discharge thereof, provided there be satisfactory evidence that the bond was intended to operate as a continuing security, a fact which may be shown or inferred sufficiently upon proof of the conduct and language of the parties to the bond, occurring after its execution.[2]

If the same person keeps separate accounts at the same bank in distinct characters, the one being his individual account, and the other being kept by him under any species of trust, if the bank has notice of the nature of this second account, it will be bound to keep the two distinct, even in spite of efforts on the part of the trustee himself to intermingle them or to transfer funds from the trust account to his private account. If the bank permits him to make such a transfer, it will be liable to reimburse the beneficiary or principal who has been robbed of his property; and if the customer has drawn out the fund, so that his own account no longer furnishes means of remuneration to the bank, it will have no recourse but to bear the loss.[3] The decision in this case was based upon the ground

1 Mosse v. Salt, 32 Beav. 269; 32 L. J. Ch'y, 756.
2 Henniker v. Wigg, 4 Q. B. (Ad. & El.) 792.
3 Bodenham v. Hoskins, 18 Engl. L. & Eq. 222.

that the bankers had cognizance of the circumstances which rendered the conduct of their customer fraudulent; and so, though not, perhaps, morally culpable, they were yet, in the view of the law, parties to the fraud. Where the circumstances fail to support a knowledge of this description, actual or implied on the part of the bank, the rule of this cause would not reach.

Where the bank itself stops payment and becomes insolvent, the customer may avail himself in set-off against his indebtedness to the bank of any indebtedness of the bank to himself, even though it has not matured at the time of the insolvency.[1]

As the bank has thus the right to pay itself the promissory note of the depositor out of his deposit, so, on the other hand, the depositor has the reciprocal right of demanding that the bank shall do so. Where a banker, holding a customer's note, and before maturity thereof, made an assignment of all his property for the benefit of his creditors, including, of course, both the note and the customer's balance, it was held that the customer might insist upon having the note satisfied out of the deposit standing to his credit.[2]

To whom Deposits must be Paid.

We have said that so soon as the bank has received the money of the depositor, the debt of the bank to him at once and simultaneously springs into complete and perfect existence. But it is essential that the depositor should deliver his money to the proper officer of the bank to receive it; otherwise the bank will not be liable for it, if it should be lost or embezzled, or should become worthless during the course of its transit into the hands of such proper officer. Ordinarily banks in the United States have a "receiving teller," so-called, whose special function it is to receive funds for deposit. If there is such an officer, a depositor, who makes his payment into the

[1] Bruyn *v.* Receiver, 9 Cow. 418, n.
[2] McCagg *v.* Woodman, 28 Ill. 84.

hands of any other officer, simply makes that recipient his own agent on this occasion for the purpose of transferring the funds to the bank, or to the receiving teller. If the officer fulfils his agency, and the funds, undiminished in amount, come into the possession of the bank, or reach the hands of the receiving teller, then the debt of the bank accrues. Otherwise the deposit is not completed, and the bank is not liable, although the fault be wholly that of its officer to whom the payment was originally made. The corporation has not delegated to him that duty, and is not responsible for his performance of it. Very often the receiving officer has his peculiar and customary stand at the bank-counter, made known to the public by a sign bearing the words, "Receiving Teller." In such case, it would seem that the payment should be made to him at this stand. Certainly it must be made to him within the banking-rooms. Otherwise, until he has brought the money into the banking-rooms, its safety is still at the risk of the payer. Neither will it suffice for a depositor, seeking to evade the consequences of these rules of law, to show isolated cases. Solitary instances of payments of funds to another officer than the receiving teller, are impotent to alter established principles. So long as such an office exists, and the incumbent continues duly to exercise his functions, the money for deposit ought in some manner to reach his hands, and proof of its occasionally coming to its destination through the hands of other agents of the institution is not enough to show that such a course is good and sufficient, when it fails to effect this disposition of the money.[1]

For what Description of Funds Depositor is entitled to Draw.

The depositor, having once brought his funds securely into the hands of the proper officer, and having duly received his credit for the amount in dollars and cents, has thereafter a

[1] Manhattan Co. v. Lydig, 4 Johns. 377; Thatcher v. Bank of State of New York, 5 Sandf. 121.

perfect claim on the bank for this amount, *in money*. When a deposit was made in good faith of the bills of a bank, supposed at the time by both parties to be solvent, but which had in fact already stopped payment, and the amount was in ordinary course passed to the credit of the depositor as so much money, so many dollars, the bank was held to repay the amount in good money; although it was shown as a fact that the bills had been kept by themselves and not mingled with the general funds of the bank, and that they still continued so when the insolvency of the issuing bank was discovered, when the receiving bank promptly sought to undo the credit. Precisely the same rule applies where the bank undertakes to make a collection for its customer, and passes the amount to his credit. In neither case is there any bailment of the specific funds or money received by the bank; but at once upon the giving credit in ordinary form the simple indebtedness accrues which, like any other indebtedness, can only be discharged in funds which the law makes a legal tender. This has been repeatedly held in the Western States where bank-bills of the so-called "wild-cat banks" were deposited, and credit given for the nominal value in dollars and cents. Frequently, the depreciation of these bills had begun at the time of deposit; often they sunk almost immediately afterwards through every stage of depreciation to utter worthlessness. But the courts uniformly held that the credit given for so much money could only be discharged by so much "money" and that bills similar to those received, or even the identical ones could not be forced upon the customer in payment.[1] The right of the depositor is not, however, necessarily to the gold or silver coin of the country; but only to such money as is by the law of the

[1] Corbit *v.* Bank of Smyrna, 2 Harring. 285; Marine Bank of Chicago *v.* Chandler, 27 Ill. 525; Marine Bank of Chicago *v.* Birney, 28 id. 90; Marine Bank of Chicago *v.* Rushmore, id. 463; Marine Bank of Chicago *v.* Ogden, 29 id. 248; Chicago Mar. & Fire Ins. Co. *v.* Carpenter, 28 id. 360; Fort *v.* Bank of Cape Fear, 1 Phillips, N. C. 417. See also the pages on the "Payment of Checks."

land legal tender at the time. Hence it has been held that a deposit made in 1860 in gold could, after the passage of the Legal Tender Act so called, be paid off in the Treasury notes of the United States to the same nominal amount, without regard to their excessive depreciation in fact.[1] Of course any local custom to make and receive payments in other than the legal money, cannot, in the absence of an express agreement between the parties, affect the rule of law; and evidence of such a custom is impertinent.[2]

Deposits in Forged Bills or Base Coin.

If the deposit be made in forged paper or in base coin, although the nominal amount be duly passed to the depositor's credit, yet no indebtedness shall accrue; for a deposit made in such material is not a payment, and can in nowise affect the relationship previously existing between the parties. It goes absolutely for nothing; and as it is a familiar rule that the transfer of such worthless stuff could not discharge a debt, so on the other hand it is equally clear that it cannot create one.[3] In like manner it would seem that the bank would be entitled to defend in a suit by the depositor by showing misrepresentation, concealment, or other species of fraud on his part.

Where the payment into the bank is made in its own bills, or in bills purporting to be its own, if the bank receives them and gives credit for them, it cannot, after the lapse of several days, repudiate them and annul the credit, on the ground that the bills were forged or fraudulently altered. This rule is based on principles of a sound public policy. A banker is held to know his customer's handwriting; the acceptor of a bill of exchange is held to know the drawer's handwriting. Vastly more

[1] Carpenter *v.* Northfield Bank, 39 Vt. 46.

[2] See cases from Illinois Reports, above cited.

[3] Bank of United States *v.* Bank of Georgia, 10 Wheat. 342; Corbit *v.* Bank of Smyrna, 2 Harring. 235; Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Jones *v.* Ryde, 5 Taunt. 488; 1 Com. Law, 166; Markle *v.* Hatfield, 2 Johns. 455; Young *v.* Adams, 6 Mass. 182; Willson *v.* Foree, 6 Johns. 110.

strong are the reasons for holding a bank to know its own bills. It is allowed to reap all the great advantage arising from the privilege of circulating them among the public as money. It has the opportunity, which banks are well known customarily to exercise, of putting private marks upon them to prevent deception when they are returned in payments or for redemption. Evidence to show that from data apparent on the face of the bills themselves the bank officers could at once have detected the fraudulent alteration of them was admitted in the case of the Bank of the United States *v.* Bank of Georgia, above cited. If then the bank has once fairly received and accepted the bills as its own and has given credit for them, it shall be taken as an adoption of them, and after the lapse of a very short time, at least, the bank cannot be heard to aver that they were either forged or false in any particular. Even that the bank has any time at all after the receipt of the bills and the giving of credit to repudiate them, is only an inference from the language used in the cited case of the Gloucester Bank *v.* Salem Bank. From this it seems, and it is certainly a reasonable rule, that if the bills were paid in and credit was given at once in the hurry of business hours, and that if on the first possible opportunity afterwards on the same day the bank officers should examine the bills, find them forged or false, and at once notify the depositor, the repudiation would be in time to save the bank, at least unless the depositor had suffered substantial injury by reason of the delay. The bank should have a reasonable time to examine the bills; and though this limit of reasonable time should be construed with great strictness and so as to hold the bank to great promptitude, still it could hardly be said that the receiving officer should pause in the midst of business hours to examine the marks of identification on each one of a large number of bills. It has been well said that in such cases the bank must be allowed to put some, at least temporary, confidence in its customers. In the case named, bills purporting to be of the Gloucester Bank, were handed to its cashier in his

absence from the bank. In return he gave a cashier's check for the amount. The court said that if they had been examined promptly upon their coming into the bank and at once rejected, this would have been in time to save the bank, which could not be considered to have actually taken its notes in payment until it had had time to examine and count them; but since it had put them away for several days before making such examination it must be held to have adopted them. In both these cases it was not questioned but that the party paying in the false bills did so in good faith. If he were guilty of any species of fraud, of course the bank would be relieved thereby, as towards him, from the ordinary consequences of its laches.

The relation of the depositor to the bank being that of a simple creditor, if the bank goes into insolvency the depositor has no right to any preference; but shall come in like any other ordinary creditor.[1]

It has been said that "*on all proper occasions*" a depositor has a right to inspect the books of the bank, and that for this purpose the officers having charge of the books[2] are agents of both parties. What would be regarded as "proper occasions" was not intimated; and certainly such a request, made without notice by the depositor or invitation by the bank, would probably be regarded by the bank officers as an unwarrantable intermeddling. The depositor not being in anywise responsible for the conduct of the affairs of the bank, not being a stockholder therein, or not applying to examine in that character, might reasonably be refused an inspection of all its private affairs. It must be supposed that the right to examine, if fully considered and passed upon, would be confined to such portions of the books as related to the accounts and dealings of the bank with the individual applicant; also that the "proper occasions" would be very narrowly defined. If the depositor has reason to think that there is an error in his account, as shown on the

[1] *In re* Franklin Bank, 1 Paige, 249.

[2] Union Bank *v.* Knapp, 8 Pick. 96; Watson *v.* Phœnix Bank, 8 Met. 217

bank book, he may reasonably demand an inspection at the first convenient hour; but the reason of the privilege, and doubtless the privilege accordingly, should be confined to such an examination only as would suffice to prove or refute the suspicion of error, and could not extend to the accounts of other customers or to the general business of the institution. It might be highly injurious to the welfare of the corporation and to the interests of all concerned to have its condition and affairs subject to inspection, and therefore to publication and gossip. Indeed the bank might be committing a positive wrong, for which it might be held to answer in damages, if it should allow one person to examine the accounts of others. For it has been laid down that a banker has no right to reveal the balance of a customer.[1] Whether or not this last-mentioned principle is sound, may, however, be regarded as still unsettled. In the case cited the question whether or not the relation between banker and customer created this duty of secrecy on the part of the former concerning the balance of the latter, appears, for some unaccountable cause, to have been left to the decision of the jury. They found that the relationship did create such a duty, and the court allowed their finding to remain undisturbed. Since then, in an American case,[2] it was questioned, but not decided, whether any such obligation upon the banker really enured at law. It is not unlikely that the English precedent would be overruled if the question should come up for decision in our courts. But it is unquestionable that a banker summoned as a witness — *a fortiori* summoned as garnishee — must answer to the balance of his customer at any given date. The fact or knowledge cannot be regarded as a "confidential communication."[3]

[1] Foster *v.* Bank of London, 3 Fost. & F. 214.
[2] Hardy *v.* Veasey, Law Rep. 3 Ex. 107.
[3] Loyd *v.* Freshfield, 2 Car. & P. 325.

Bank-books, or Pass-books.

The custom is probably universal in this country for every depositor with a bank to have his bank-book, so called. In England the same thing is called a "passage-book" or "pass-book." It is hardly necessary to describe any thing so familiarly known. Instead of this book, private bankers more usually give simple receipts; or without even this, only render to their customers, from time to time, balanced accounts.

Ordinarily whenever a deposit is made, the bank-book is presented at the bank counter for the purpose of having the amount and date of the deposit contemporaneously entered therein by the bank clerk or teller. At intervals, also, it is sent into the bank to be balanced by the proper officer; after which it is returned to the depositor, customarily accompanied by all his checks which have been paid by the bank since the date of the next preceding balancing. It will be seen that the chief value of the book is that the depositor may have a species of check upon the bank, and may use it as evidence upon the occurrence of any dispute and lawsuit. The entries in the bank-book, made by the proper officer, bind the bank as admissions. Especially the balancing of the book is conclusive upon the bank in the same manner as an account stated. But the entry of credit for a deposit is held to be an original entry only on the supposition that, as in the ordinary course of business above described, the book accompanied the deposit and the entry was made by the teller simultaneously with the receipt of the money and as part of the same transaction. For if the book was sent to be written up afterwards from the books or memorandum in possession of the bank, the entries are not original, and may be examined into.[1] But the entry of the credit is after all only a receipt. It binds the bank as much as a formal receipt.[2] But apparently it binds it no more; and as such a

[1] Manhattan Co. v. Lydig, 4 Johns. 377.
[2] Union Bank v. Knapp, 3 Pick. 96.

receipt is open to explanation by evidence *aliunde*, it would seem that the entry in the bank-book should stand on the same footing; save that perhaps, from the course and nature of the business, a somewhat greater promptitude in discovering the error might be required, than that which would suffice in the case of an ordinary receipt erroneously passed between two individuals.

But the most difficult questions arise in considering to what extent the bank-book can be regarded as binding upon the depositor. In the simple case of an erroneous entry by the receiving teller, of course the customer may insist upon correction. Even where he himself accompanied his deposit with the ordinary memorandum stating what sums he was depositing, and the receiving teller's entry corresponds with this memorandum, he is allowed to show that both his memorandum and the entry were wrong and gave him credit for too small a sum. For the bank is in fact liable for precisely the amount of money it receives. It is the fact of receiving which by itself creates and perfects the debt, and which alone need be shown. The receipt therefore is open to correction in favor of the payer, if it be erroneous. The actual fact of the real deposit is alone absolutely conclusive. This rule of law is rigid, and can only be dispensed with by the express agreement of the parties. It cannot be infringed or modified by reason of any orders or by-laws of the bank.[1] When however the book has been balanced by the bank officer, has been returned to the depositor together with his checks, and he has retained it for any length of time without objecting to it, the matter becomes less clear, and the decisions are not wholly harmonious. The object which the bank has in view clearly is to put the depositor in the way promptly to discover and demand correction of any mistake existing in its account with him. Accordingly it has been held in England that the silence of the customer for a reasonable time after receiving back his books and checks would be deemed

[1] Mechanics' & Farmers' Bank *v.* Smith, 19 Johns. 115.

an admission on his part of the correctness of the balance.[1] It is not that his right to have the book amended to agree with the fact has been modified; but that he has lost that right altogether by reason of his own laches in failing to demand the amendment earlier. In Union Bank *v.* Knapp, *supra*, the bank-book was said to be a transcript of the books of the bank, and so, if not objected to, to operate as a mutual acknowledgment of the parties as to their money dealings. But the construction which this remark ought to receive from the circumstances of the case, and the course of reasoning adopted by the court, both go to show that the judges did not mean to adopt the English rule. The case really arose and was decided under the Statute of Limitations. They say that the balance struck goes into the new account as a single item, and as such is taken out of the statute; but that it is taken out as a solid amount; that the several items going to make it up are not taken out of the statute and cannot be inquired into. Since the court thus take the pains to say that the items shall not be looked into after six years from the date of the balancing, which must *then* be regarded as conclusive, it must be inferred that they do not mean to regard the book or the balancing as a *conclusive* "mutual acknowledgment" of the items at times prior to the lapse of that period. In Watson *v.* Phœnix Bank, *supra*, the depositor's bank-book was said to be no better evidence than the books of the bank. That is to say, it is a mere account drawn up by bank officers and not reinforced by a presumption of correctness, growing out of its possession by the depositor. The best rule, as it is the most just, seems to be the one laid down in the New York cases. In Weisser *v.* Denison,[2] the ruling was substantially that if the depositor had not examined and objected to the account stated in his book within a reasonable time after it had been balanced and returned to him with the checks, his silence could at most only be *prima facie* evidence against him, and would throw the burden of proof upon him, instead of leav-

[1] Devaynes *v.* Noble, 1 Meriv. 541. [2] 6 Seld. 68.

ing it, where it would otherwise rest, with the bank, to prove its payments. So the depositor was allowed to show that certain checks charged against him in the account were forgeries, though a considerable time had elapsed since he received back his book. Johnson, J., said that in contemplation of law the book was balanced and the checks returned to him for his protection, not for that of the bank. This, perhaps, is not wholly correct. Doubtless the bank has its own protection from precisely these tardy disputes partially in view, as it may reasonably expect that any ordinarily careful man will not long delay to see that the balance is correct. The language used by one of the judges intimates that if in the interval the bank had suffered any injury which it might have escaped or avoided had it received correction in due season from its depositor, then the rights of the parties might be affected by this fact also. In Manhattan Co. *v.* Lydig, *supra*, it was said that though the depositor should not be allowed to open the whole account, yet after the lapse of a moderate time without objection by him, he might be allowed to falsify certain particular items. Whether this right ought to be allowed to exist for so long a time as the six years of the Statute of Limitations may well be questioned. Probably such time as the courts should consider reasonable, upon consideration of the nature, course, and amount of the dealings between the parties, would be held conclusive against the depositor. For after he has passed many successive balancings, for many months or years, having meantime had multitudinous transactions with the bank, it might fairly be deemed an unreasonable hardship if he could still be allowed to go back and litigate to correct an error which he has so long had the means of correcting, and which the bank might justly presume that any ordinarily careful person could not fail to have corrected long since.

Evidence as between Bank and Depositor.

The books of the bank are admissible evidence in its behalf, as against a depositor, or one who has been a depositor. But when offered by the bank, the entries must be proved by the evidence of the clerk who made them, or if he be dead or inaccessible, then by proof of his handwriting.[1] So too the cashier of the bank is competent to prove the amount of a deposit in favor of the bank; certainly, if he bank releases him from any possible liability he may be under to it for any mistake or misconduct of his own in the matter; and perhaps so, even if the bank does not thus release him.[2]

It has been held in England that the name in the bank-book is not conclusive as to the person with whom the bank contracted. If money be deposited by A. in his own name, B. may recover from the bank by showing that the deposit was in fact made upon his account, that he was the principal and the real lender. But his evidence to this effect must be very clear and explicit.[3]

A certificate of deposit, or the written acknowledgment of the bank, that it has received from a certain person a certain sum on deposit, is an instrument occasionally issued. Chiefly it is given to persons, not regular customers of the bank and not designing to become such, but who have for some reason, and on some isolated occasion, desired to leave a sum of money in the custody of the bank. Sometimes, though more rarely, a regular customer, having some special object to subserve, may desire such a certificate. In form they are substantially simple receipts of the bank for so many dollars, and so are only evidence of an indebtedness like the bank-book. But the practical ease with which the holder of such a receipt can transfer it for value received, or pledge it as security, has led to considerable

[1] Union Bank *v.* Knapp, *ubi supra;* Watson *v.* Phœnix Bank, *ubi supra;* Johnson *v.* Farmers' Bank, 1 Harring. 117.

[2] Johnson *v.* Farmers' Bank, *ubi supra.*

[3] Sims *v.* Bond, 5 Barn. & Ad. 389.

litigation upon such instruments. They have been held to be in fact equivalent to promissory notes. Usually they embody an express promise, in terms, to pay, but even if they do not, they are yet the bank's acknowledgment of its indebtedness, and so are of the same effect as if they expressly promised payment. Substantially therefore they resemble promissory notes, and the courts have always inclined to regard them as such, especially when they are made payable otherwise than immediately and upon demand. If they are payable at a future day certain they are simply promissory notes, neither more nor less. If a bank cannot issue its negotiable promissory note, neither can it issue a negotiable certificate of deposit of this description. If the note would be void, so likewise is the certificate. If however the bank is empowered to issue promissory notes, subject only to the restriction that it shall issue none which are designed to pass into circulation as currency, but only such as become necessary in the ordinary course and conduct of its affairs and are strictly business paper, then it may issue certificates of deposit, whether payable on demand or otherwise, subject only to the same restriction. By reason of the ease with which such instruments may be used for circulation, the courts have often been rigid in scrutinizing them and applying the strict letter of the law to them; but they have never, that we have found, substantially modified or departed from the general principles above laid down.[1] The present sound principles of banking established throughout the country leave little interest attaching to this subject, the chief difficulties in which grow out of the evasions and subterfuges attendant upon "wild-cat" banking.

[1] Curtis v. Leavitt, 15 N. Y. 19; Leavitt v. Palmer, 8 Comst. 19; Barnes v. Ontario Bank, 19 N. Y. 152; Bank of Orleans v. Merrill, 2 Hill, 295; Southern Loan Co. v. Morris, 2 Barr. 175; Craig v. State of Missouri, 4 Pet. 433; Miller v. Austen, 13 How. 218; Kilgore v. Bulkley, 14 Conn. 362; Laughlin v. Marshall, 19 Ill. 390; Bank of Pennsylvania v. Farnsworth, 18 id. 568; Lindsey v. McClelland, 18 Wis. 481; White v. Franklin Bank, 22 Pick. 181; Bank of Chillicothe v. Dodge, 8 Barb. 233; Bank Commissioners v. St. Lawrence Bank, 3 Seld. 513.

A certificate of deposit may or may not be made negotiable. It may be made payable to A. B., when it is not negotiable. It may be made payable to A. B. or order, when it is negotiable by indorsement. It may be made payable to A. B. or bearer, when it is negotiable by simple delivery. If it be expressed as payable "in currency" or "in current funds" or the like phraseology, it is not negotiable because it is not made payable in money, but in that which at the time of payment may or may not be money. A tender in any of the circulating notes of the banks of the State would seem sufficient to satisfy the requirements of an instrument so worded; and courts will not consider current funds to be necessarily either money or equivalent to money.[1]

Where the certificate, as is not unfrequently the case, states that the amount is payable "on the return of this certificate," or on its presentment, or other such phrase, this language does not alter the legal effect of the instrument. As a promissory note, naming no place of payment, — for a heading with the name of the bank is not such a naming, — the maker, the bank, is bound to find it out and offer to pay it; and not till then can a return of it be claimed. Neither is the holder generally deemed to be under any obligation to present it for payment before suit upon it.[2] Though where a certificate was given to A., "payable to order of himself on presentation of this certificate properly indorsed," the court regarded this as so far like an ordinary deposit that A. could not sue the bank upon it without a previous demand.[3]

Ordinarily, the signature of the cashier to the certificate is sufficient. Though it is a contract in strict law, and though statutes often designate the manner in which "contracts" shall be signed, yet the phrase thus used in the statutes has, by sheer

[1] Ford v. Mitchell, 15 Wis. 304, and cases cited; Platt v. Sauk County Bank, 17 id. 222; Lindsey v. McClelland, 18 id. 481.

[2] Hunt v. Divine, 37 Ill. 137; Smilie v. Stevens, 39 Vt. 315, affirmed in Bellows Falls Bank v. Rutland County Bank, 40 id. 377.

[3] Bellows Falls Bank v. Rutland County Bank, 40 id. 377.

force of necessity and common sense, been construed by the courts not to apply to those instruments, which by the daily course of business in all banking institutions the cashier alone is wont to execute, and among which the simple receipt and promise to repay, which constitute a certificate of deposit, are to be included.[1]

Special Deposits.

A special deposit, so-called, is the placing of something in the charge or custody of the bank, of which specific thing restitution must be made.[2] The taking of a special deposit falls sufficiently within the general scope of the banking business to be a legitimate act, although no express power is conferred by the charter of the bank, or by the organic law, so to do. It is an incident to the general functions of the institution.[3]

It is the usage of banks to receive special deposits from their customers gratuitously. They accept no pay, and derive no benefit from the act, which is done solely for the depositor's accommodation. It is therefore a naked bailment, and the bank is bound only to keep the property with the same care with which it keeps its own property of the like description. It need keep no further supervision over the officers who have direct charge and control of it than it keeps over the same officers having the same charge and control of its own property of the same kind. So if the property be placed in the vaults of the bank together with its own similar property, and be thence stolen by the officer who has charge of the vaults, the bank is not liable to the depositor. But if any special arrangement should be entered into by which the bank should be en-

[1] See the chapter on "Franchise and General Powers," Division "Contracts." Also the following cases: Curtis *v.* Leavitt, 15 N. Y. 9; Barnes *v.* Ontario Bank, *ubi supra;* State Bank *v.* Kain, 1 Breese, 45; State Bank *v.* Lock, 4 Dev. 583.

[2] Dawson *v.* Real Estate Bank, 5 Pike, 283; Story on Bailments, § 88.

[3] Foster *v.* Essex Bank, 17 Mass. 479; Marine Bank of Chicago *v.* Chandler, 27 Ill. 525.

abled to derive any advantage or profit from the receipt and custody of the deposit, or if it should accept pay for the care of the same, then its duties would at once be changed to those of an ordinary bailee for hire. Then, as in the supposed instance of robbery or embezzlement by one of its own officers, it would be no exoneration from liability to show that the same care had been taken of this as of the bank's funds, and that the same officer had in the same way plundered the bank itself. The corporation would still be held to make good the bailor's loss. But it is clear that some such direct advantage, operating by way of consideration for the assumption of increased responsibility, must accrue to the bank to place it under such an obligation. An express stipulation or acknowledgment, given by the cashier in writing, to the effect that the property has been received by the bank "for safe-keeping," does not make the transaction other than a naked bailment, as above stated.[1]

Any thing whatever, which the bank may consent to receive in charge, may be the subject of a special deposit. Ordinarily, a deposit of money, at least if it be the current money of the country or State where the deposit is made, will be assumed to be a general deposit, unless the contrary is at the time directly notified, or in some shape directly implied, so that the bank could not reasonably misunderstand the depositor's intent. Thus, if a "sealed packet, bag, box, or chest" be deposited, though it contain ordinary current money, yet the manner and condition of the delivery shall suffice to inform the bank that the deposit is designed to be special and not general. Neither does it matter what may be the actual value of the property deposited, or what that value may become during the period of deposit. If bills or notes be deposited which are partially depreciated, and which continue to depreciate even to the point of worthlessness, yet the bank is still bound to restore them specifically to the depositor, whose rights of ownership are not

[1] Foster v Essex Bank, *supra*.

affected by value of the property.[1] It was thus held, even where the deposit was of "Confederate money," and of the so-called "cotton money," current in the revolted States during our last war. The illegality and wrongfulness attendant upon the original issue, and subsequent using of such money, was not sufficient excuse to exonerate the bank from returning a special deposit of it, *in specie.*

After the passage of the Legal Tender Acts, so-called, it was held, in Pennsylvania, that a deposit of so much gold coin, for which a certificate of deposit was returned, could yet be repaid in treasury notes.[2] It was regarded as a general deposit of money, not as a special deposit of specific coins. And in Wisconsin, it was less justifiably held that a deposit of coin, as collateral for a loan, which is, in fact, at least for the purposes involved in this discussion, a special deposit of that coin could be discharged by the return of the same nominal amount in the legal tender treasury notes of the United States.[3] In Indiana, it was properly held, on the contrary, that where a special deposit of gold coin, partly of the United States and partly foreign, had been converted by the bailee, the bailor should be allowed to recover the real *value* of the amount in the treasury notes, as contradistinguished from the nominally equivalent sum.[4]

On principle, it would seem that it would be always proper and legitimate to draw a distinction, for various purposes, between coin of the United States and coin of a foreign country, which has not been adopted into ordinary daily currency among the people of the United States. If a deposit of the former be made, in ordinary times when coin is at par, it must be taken as a general deposit unless otherwise explained. But if a deposit of the latter be made, it should be taken as a special

[1] Dawson *v.* Real Estate Bank, 5 Pike, 283; Green *v.* Sizer, 40 Miss. 530. And see Maynard *v.* Newman, 1 Nev. 271.

[2] Sandford *v.* Hays, 52 Penn. St. 26.

[3] Warner *v.* Sauk County Bank, 20 Wis. 492.

[4] Bank of the State *v.* Burton, 27 Ind. 426.

deposit, in the absence of express understanding. For it is not properly a payment. Payment, except by agreement of parties, could not be made in such material. The bank cannot, practically at least, pay it out again to its customers; it cannot use it for meeting the checks of depositors, not even of the very party depositing it, if it be in fact a general deposit. In short, foreign coin is in the United States, so far in the nature of a commodity that it cannot pass either to or from a banker as money unless by force of an agreement between the parties, either express or to be implied from their usual course of dealing together. So if it should be the case that the present or any future Legal Tender Act should make it sufficient for a bank to return in treasury notes the nominal sum which it has received in gold coin of the United States, it yet would not follow that a similar return of the nominal value of foreign coin would be, as a matter of logical necessity, equally legitimate. The coin and the notes of the United States are both currency of the United States, and the law simply refuses to recognize any distinction or difference between them. But the foreign coin is different from both these kinds of currency; even if it were to be replaced by gold coin of the United States, still its value, in the shape of exchange, would be credited or debited in making up the judgment. None the less should its value be estimated in the usual currency of the country which is legal tender, and is the only money practically in use. Further, it certainly seems to us that both law and justice would sustain the rule that where gold is practically a commodity even when in the shape of coin; when it has ceased to circulate and to be transferred from man to man as current money, then a deposit in it should no longer be regarded as presumably a deposit of so many dollars, returnable in paper of much less real value, but should be considered *prima facie* a special deposit, as much as gold dust or jewels in ordinary times. As has been seen, a special deposit does not enter into the general funds of the bank, and form a part of its disposable capital. It is to be

kept by itself, and to be specifically returned. Hence, it follows that a bank cannot base any increase of its issues or discounts upon such unavailable deposits. They are in no sense at its disposal, and it can in no manner (unless there be a special, extraordinary, and peculiar arrangement) reap any advantage or profit, direct or indirect, from the simple custody of them. They are not part of its moneys. Whence it follows that if the law require the bank to return to the government officials an annual account of moneys deposited, yet the bank is not bound to return any account of its special deposits.[1]

Trover will lie for a depositor to recover his special deposit, *in specie;* or, if it has been converted by the bailee, *assumpsit* will lie to recover its value.[2]

Interest Accounts.

Ordinarily, a general deposit with an incorporated bank in this country does not bear interest. But private bankers usually pay interest on customers' balances, and *e converso*, charge interest on their overdrafts. With us, however, it is a proper subject of a special agreement or understanding between the parties. In England it might be judicially noticed and assumed by the courts as the regular course of business. But probably it would not be so with us, where private banking is carried on to a much less degree. Such agreements may be entered into also with an incorporated bank, and certainly they would never be assumed in dealings with a corporation or association, however it might be with a firm or an individual in the business. It naturally happens that nearly all the cases which we find on this subject are English.[3] They chiefly concern disputes which

[1] Foster *v.* Essex Bank, *supra.*

[2] Foster *v.* Essex Bank, *supra;* Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299; Green *v.* Sizer, *supra.*

[3] Gwyn *v.* Godby, 4 Taunt. 346; Ikin *v.* Bradley, 5 Price, 536; Crosskill *v.* Bower, 32 Beav. 86.

arise as to when rests may be taken; and as to what rate of interest shall be allowed in cases not specifically provided for by a distinct agreement. Usage, if it contravenes no law, will govern in such controversies. So when a banker and his customer are shown to have conducted their banking account for a series of years upon a certain specified system, which is not in itself intrinsically illegal, it will be assumed that that system had been originally agreed upon between them, and the principles involved in it will be held binding for the solution of any subsequent disagreement.[1] But acquiescence in the general system does not go further than to fix the principle upon which the accounts shall be computed; it does not admit the accuracy of particular items, any of which may be disputed.[2]

It is necessary, however, that the principle which it is sought thus to establish should be one that is in itself strictly legal. Thus it cannot be questioned that a bank, or banker, equally with any other individual, is subject to the operation of the usury laws, and cannot exact more than the legal rate of interest, either directly or indirectly. The custom, pursued in discounting, of deducting the interest at the beginning of the term of the loan, thereby in fact gaining a very little more than the strict legal rate, is allowed and has been sanctioned by the courts; this matter is treated under the topic "Discount," p. 16.[3] One of the most common methods of circumventing the usury laws is by taking "rests" at very short intervals, and so compounding the interest many times, perhaps, in the course of a single year. That "rests" may be taken at intervals of proper length is undoubted; the only question is, what interval is proper? In Clancarty *v.* Latouche, *supra*, a compounding at tri-monthly rests was declared to be usurious and intolerable. In Rufford *v.* Bishop,[4] it was said that the decision in Clancarty *v.* Latouche seemed to throw some doubts on rests

[1] Mosse *v.* Salt, 32 Beav. 269.
[2] Ibid.; Clancarty *v.* Latouche, 1 Ball & B. 420.
[3] Maine Bank *v.* Butts, 9 Mass. 49.
[4] 5 Russ. 346.

at a less interval than one year, but that it must be admitted that shorter rests were legal. No definite rule of law therefore exists on the point. In the United States, accountings in every branch of business are customarily had more promptly and frequently than is usual in England, and it is quite probable that tri-monthly rests might be sanctioned, if agreed to by both parties.

The nature of the customer's indebtedness to his banker for advances is not affected by the fact that the final footing is cast so as to include interest, which, by rests at proper intervals, has been from time to time converted into principal, and has since itself also borne interest. Hence a mortgage, given generally to secure the customer's balance, will secure a balance of which such interest, and interest upon interest, are component parts.[1] But where a mortgage is given by the customer to secure a specific balance owing by him on a certain day, and subsequent transactions are had between the parties, in which, as well as in those which had preceded the mortgage, compound interest was uniformly charged, it was nevertheless held that the precise sum secured by the mortgage was thereby at once excepted from the general custom governing the other dealings of the parties, and that interest could not thereafter be compounded thereon, but must be calculated at simple rates, as in all cases of ordinary mortgage debts.[2]

When a judgment is recovered by the bank against the customer for overdrafts or advances, interest will be allowed at the same rate which the bank itself was paying upon deposits on the same account.[3] But where the banker and the customer arrange that all indebtedness of either to the other shall bear interest at a certain rate per cent, yet upon the death of the customer, or upon his closing his dealings with the banker, being at the time indebted to him, or upon his insolvency; or upon the death of the banker, or his ceasing to carry on busi-

[1] Rufford v. Bishop, *supra*. [2] Mosse v. Salt, 32 Beav. 269.
[3] Gwyn v. Godby, *supra*; Ikin v. Bradley, *supra*.

ness, or becoming bankrupt, the special arrangement at once ceases to operate, and from the date of such occurrence the balance of indebtedness then due from either to the other carries only such simple interest as is carried by any other ordinary contract debt.[1]

In casting interest it is clear that the banker must debit the drawer of a check, not from the date of the drawing but from the date of the actual payment of the check.[2] If the banker accepts the check some time before actually paying it, it has not been decided whether he may debit the drawer from the date of the acceptance or from that of the paying. But it has been said that the accepting of a check payable at a day future is equivalent to a loan, by the drawer to the banker, of the amount named for the interval. Following this principle, it would practically amount to a debiting at the time of payment. For if the debit were made at the time of acceptance, yet the acceptance, creating at once a loan from the depositor to the banker for the interval, would cause interest to run on the same sum, for the same period at the same rate per cent, from the banker to the customer, and the one amount would exactly offset the other. But since the acceptance only binds the banker, at his own peril, to keep funds enough of the depositor to meet it when payment is demanded, and as until such demand he has the full use of such funds, it would seem interest should in reason be calculated to the date when demand may be made.

From the rule laid down at the opening of this chapter, that the banker is in no sense a trustee, or *quasi* trustee, for the benefit of his customer, it follows that under an agreement to allow interest, he is under no obligation annually to balance the account and credit the interest, so as to prevent the running of the Statute of Limitations.[3]

[1] Crosskill *v.* Bower, 32 Beav. 86.

[2] Goodbody *v.* Foster, cited to this point in Byles or Bills, Sharswood's ed., p. 25.

[3] Pott *v.* Clegg, 16 Mee. & W. 321; Foley *v.* Hill, 2 H. L. Ca. 40.

CHAPTER III.

POWERS, DUTIES, AND LIABILITIES OF OFFICERS AND AGENTS.

Conduct of the Corporate Business through Agents or Officers.

THE old rule of law was, that a corporation could do no act save by a deed executed under its corporate seal. But this ancient principle has of late years been done away with by the compulsion of the practical necessities of business; and in our land and our time corporations without number transact their affairs with a very infrequent use of this once indispensable formality. In the case of The Bank of Columbia *v.* Patterson's Administrator,[1] the Supreme Court of the United States first boldly and absolutely declared that the old rule could no longer be regarded as law, and the same has been since consistently and frequently ruled, in cases not only of banks but of various other species of corporations.[2] That class of corporations which are the creatures of a statute, whether general or special, are said never to have been within the force of the common-law rule. If the statute provides that the management shall be in the hands of a board, or if it orders or authorizes the election of certain officers for the fulfilment of certain familiar functions, all acts done by such board or by such officers within the scope of their authority are to be regarded as done directly under and in pursuance of a power vested in them by the legislative enactment, and therefore as relieved from those formalities which otherwise the common law might demand. Then, too, the

[1] 7 Cranch, 299.

[2] Fleckner *v.* Bank of United States, 8 Wheat. 338; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 id. 326; Stamford Bank *v.* Benedict, 15 Conn. 437; Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256; Fishmongers' Company *v.* Robertson, 12 L. J. N. S. 185; 5 Man. & Gr. 286; 6 Scott, N. R. 56.

ancient rule simply required that when the corporation itself performed an act, that act should be done by deed and with the seal. This rule, strictly construed, still leaves the corporation free to create agents to whom it may delegate power to act for it, and the acts of such agents, though binding the corporation, are yet not precisely the acts of the corporation, and so need not be performed by deed nor evidenced by seal. Such are the two favorite methods which jurists have adopted for annulling without breaking an ancient and time-honored principle. Either artifice accomplishes sufficiently satisfactorily the desired end. Though to make the former apply it is essential that there should be a statutory enactment, which is not wholly silent concerning the government or appointment of officers of the corporation; and the latter is available only when the deed and corporate seal appear somewhere in the chain of proceedings. For the corporation must act somewhere and at some time in creating the original agency and making the primal delegation, and this act must be accompanied by the common-law formalities, since it cannot receive the protection of the agency-theory. But the simple truth is, that the elastic expansion of modern business has irrevocably snapped the clumsy and useless ligament, which older generations found less intolerable. Judges, in evading the rigidity of an antiquated dogma of the law, have simply yielded to that pressure of invincible necessity which the developments in the conduct and systems of the business world are every day bringing to bear upon old-world legal technicalities. It would only drag the law into contempt to declare that it requires every check or draft, every loan or discount, every indorsement or transfer, made by a bank, to be evidenced by a corporate deed and seal.

The business of an incorporated bank[1] can of course be con-

[1] The "associations" of New York, organized under the statutes of that state, differ only in some slight and insignificant particulars from ordinary corporations. For all the purposes of the matters now under discussion they may be regarded as corporations. The National Banking Act, sec. 8, especially declares that all

ducted only by agents of the corporation, or, as they are commonly styled, officers of the bank. It is in the corporate shape that nearly all the banking business in the United States is carried on; though the English system, by which private individuals and partnerships enter into the banking business, is by no means unknown among us. Even in this species of arrangement, however, the individual or partnership, if the business be tolerably large, must appoint clerks or agents, who must perform the functions, and may often assume the titles, of certain of the bank officers, — not of president or directors, of course, but of cashier, teller, book-keeper, and the like. In either case, the official or clerk is in fact strictly the agent of the corporation, partnership, or individual; and in general terms it may be stated that the ordinary rules of the law of agency will apply for the settlement of all appropriate questions. These rules will govern all transactions in which the corporation or its official are parties, just as much as they govern all transactions in which the individual and his clerk are the parties. It makes no difference that the principal is a corporate body, and that the agent has an official designation. His title serves only to show in what class of dealings, for what purposes, and with what powers he is accredited as an agent; and the simple legal relationship of principal and agent, as it is well understood in its constant occurrence between individuals, is to be found with precisely the same legal attributes beneath the corporate impersonality and the official dignity.[1]

So all acts done by an agent, with the essential proviso that they be done officially,[2] and that they fall within the scope of his powers and duties,[3] are in law the acts of the corporation itself. Whether these be rightful or wrongful, innocent third

organizations under its provisions though called "associations," shall yet have the legal character of corporations.

[1] Frankfort Bank v. Johnson, 24 Me. 490; Atlantic Bank v. Merchants' Bank, 10 Gray, 582.

[2] Hughes v. Bank of Somerset, 5 Litt. 45.

[3] New Hampshire Sav. Bank v. Downing, 16 N. H. 187.

parties have the right to regard them in this light, and the law will thus construe them. In like manner, knowledge obtained by the agent in his official capacity, and within the scope of his agency, will affect the corporation; and declarations made by him in the like manner and within the like range will bind the corporation. But acts done, knowledge obtained, or declarations made, beyond such scope, or not in an official capacity, do not affect the company at all.[1]

Any person, therefore, who deals innocently with the agent or officer of a corporation within the scope of that agent's or officer's functions will be fully protected, and will have his contract enforced by the law. This rule accords so perfectly with both law and justice that it has never been directly assaulted, save in one class of cases. These are where the agent, acting indeed within the general and ordinary scope of the agency, is yet in fact contravening some express order, or exceeding some special limitation of authority, imposed upon him in derogation of his natural and usual power. When such cases have arisen, corporations have sometimes sought to avoid responsibility by insisting that since their agent had exceeded his powers he had not bound his principal. In such cases the simple question is, whether or not the third party dealing with the agent had a *right to suppose* that he was dealing within the scope of his authority. If the ordinary functions of an agent are well known, a secret limitation of those functions will not be allowed to operate to invalidate his act done in excess of the secret limitation but within the ordinary scope. The secret limitation can take effect only when notice of it is directly brought home to the third party. Any other rule would open wide the door

1 Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 299; Fleckner v. Bank of United States, 8 Wheat. 338; Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Fulton Bank v. N. Y. & Sharon Canal Co., 4 Paige, 127; Boom v. City of Utica, 2 Barb. 104; New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166; Wright v. Georgia R.R. & Banking Co., 34 Geo. 330; Hartford Bank v. Hart, 3 Day, 493; Wyman v. Hallowell & Augusta Bank, 14 Mass. 62; Salem Bank v. Gloucester Bank, 17 id. 1; Madison & Indianapolis R. R. Co. v. Norwich Savings Soc., 24 Ind. 457.

to endless deceit and false dealing.[1] As a general principle, this is sufficiently clear and well established. But in the case of banking corporations it is liable to confusion from the uncertainty attendant upon the knowledge which any individual has of the real limits of the powers and duties of any particular officer. If a statute defined accurately the acts which each officer should be competent to perform this difficulty would be avoided. But in the absence of such enactments every board of directors may assume, and very many in fact do assume, to define the functions of the respective officers according to its own notions of propriety in such matters. Or it may be that the board will conceive it preferable to attempt no such definition, but simply to appoint one person to be "cashier," another to be "receiving teller," another to be "paying teller," and so on through the various offices. Now in either of these cases it is natural, indeed it is necessary, that a third person should suppose that these various officers are empowered to perform the duties which the ordinary usage and method in the transaction of banking business leaves in the hands of such officers. Upon this supposition it is practically necessary that the public should act in dealings with the bank. Certainly the supposition is sufficiently vague. The basis of usage on which it rests is little more stable than a quicksand. It is not uniform in different cities, often not in different institutions in the same city, and perhaps not in the same cities or institutions throughout a long course of years. Still a small nucleus of certainty has grown by degrees into existence amid the great uncertainty. The word "cashier" means something; the word "teller" means something. This is shown very conclusively by the frequency with which directorial boards content themselves with simply installing a person in one or other of these offices, without any effort to name the appurtenant duties, but

[1] Mayall v. Boston & Maine R.R. Co., 19 N. H. 122; Farmers' & Mechanics' Bank v. Champlain Transportation Co., 23 Vt. 186; Clarke National Bank v. Bank of Albion, 52 Barb. 592.

assuming by unavoidable implication that of course there is a certain well known range of powers and duties as naturally and necessarily constituting the office, and as publicly known and understood to do so, as if they should be embodied in a written vote. Courts have many times recognized the same fact, and have decided that president, directors, cashier, and teller have or have not either exclusive or concurrent powers to do acts of the nature designated in the respective case. For example, the power to discount is exclusive in directors, as such. The power to draw checks is in the cashier by virtue of his office. The president, *quâ* president, is empowered to defend suits and engage counsel on behalf of the bank. There are then certain classes of acts which the law recognizes as inherent in certain officers to perform. These classes may be increased by future decisions. The only absolute limit yet set to them is when judicial *dicta* have declared some special power *not* to be inherent in some special officer. Starting then from this position that there are certain powers, only a portion of which are yet known by the certain knowledge which grows out of a judicial ruling, which belong to and constitute a certain office, it is clearly reasonable and just that the public, and any individual member thereof, dealing with a person notoriously filling such an office, should have the right to presume, in the absence of express notification to the contrary, that such person has such powers. It may be that a board of directors could by vote declare that their cashier should not have power to draw a check. But if they still allow him to fill the office of cashier, as to all third parties dealing with him in ignorance of this unusual limitation he must still be allowed to bind the bank by the exercise of this customarily inherent authority. That he has exceeded the scope of his agency may be urged by the bank against him personally, and may be an abstract truth, but it is one which public policy will never allow the bank to set up against the claim of a third party who dealt in ignorance of this peculiar and extraordinary limitation. If therefore the corpora-

tion, or any authority within and on behalf of the corporation, undertake to set strange limits to the powers which it will allow to be exercised by its officers, it must either refrain from giving to these officers the titles usually regarded as indicative of such powers, and for that reason equivalent to a general holding out of them to the world as possessing such powers, or they must bring home to persons dealing with them a knowledge of the limitations they have seen fit to draw around the offices. Otherwise the corporation will be bound by acts of their president within the scope of the ordinary and legally inherent duties and powers of a president; by acts of their cashier within the scope of the ordinary and legally inherent duties and powers of a cashier; and so on, through the whole range of offices.

Obviously the names and titles by which the various agents are denominated are intended to designate, and must be presumed to designate, the nature and scope of their respective agencies. If a banking corporation gives to an individual a title which in ordinary banking parlance is attached to a certain range of powers and duties, it cannot afterwards be heard to say that the secret instructions of the corporate government or the peculiar by-laws adopted by it have deprived the officer of these powers and duties, or any of them. One dealing with the officer of a bank within the ordinary and legal scope of such an officer's authority, is entitled in justice and at law to assume as against the bank that the officer is invested with this customary authority.

Neither does it make any difference in this respect that the charter, or the statute under which the corporation exists, gives to the board of directors power to settle the respective functions of the subordinate officers. Our National Banking Act[1] empowers the directors to "appoint a president, vice-president, cashier, and other officers, *define their duties*," &c., also "to define and regulate by by-laws . . . the manner in which . . . its officers [shall be] appointed, its property transferred, its

[1] Stat. 1863–4, chap. 106, § 8.

general business conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed." Occasionally, in other enactments, the expression "to define and limit" their duties has been used. After all, these phrases probably give to the directors no power over these officers which they would not be allowed to exercise by virtue of their common-law authority. The directors are the government of the bank, and must have power to direct and control the acts and doings of the other and subordinate agents. But whether at common law or under such statutory enactments, they seek to curtail the ordinary powers of any of their officers, their action in so doing can only be valid as between the officer and the bank. If the officer does what they have expressly forbidden him to do, though it be an act ordinarily within the range of his functions, he will be liable only to the corporation for the results of his disobedience. The directors unquestionably have the power, *as against him*, to "define" his duties generally, or to "regulate" or "limit" them upon any particular occasion, and in any particular matter. They also have the same power as towards any individuals among the public, or even as towards the entire public. But it is an absolutely indispensable preliminary to the exercise of the power in this direction that the individuals or the public should receive actual notice of the fact.

The judicial authorities seem fully to sustain the propounded doctrine. The matter is one of sufficient importance to justify the quotation of the more conclusive passages. In Minor *v.* Mechanics' Bank of Alexandria,[1] the court say, "Officers of a bank, as of any other corporation, are held out to the public as having authority to act according to the general usage, practice, and course of their business. Their acts within the scope of such authority will generally bind the bank in favor of third persons possessing no other knowledge." In The Bank of Vergennes *v.* Warren,[2] discussing the legality of

[1] 1 Pet. 46. [2] 7 Hill, 91.

an act, which the court held to fall within the scope of the cashier's power, *quâ* "cashier," the judge said, "Indeed, I think, it would not defeat the purchase if it could be shown that the cashier had been forbidden by the principals to transact such business." In Commercial Bank of Buffalo *v.* Kortright,[1] the court applies to banks and their officers the general rule of agency, as laid down in Story on Agency, §§ 127, 133: that the principal is bound by acts which he holds out his agent as competent to perform, despite that they may contravene secret instructions or orders. Unquestionably any person invested with the familiar title of an official position in a bank is held out to the public as competent to perform all the usual and inherent or essential functions of the office. In Wild *v.* Bank of Passamaquoddy,[2] it was said: that any bank choosing to restrict the ordinary scope of its cashier's authority is at perfect liberty to do so; but that, in such case, it is incumbent on the bank to show, not only the fact that it has imposed a certain restriction, but further, that the imposition of this restriction, being of a peculiar and unwonted kind, *is known* to those with whom it is in the habit of doing business. The language in this case would seem to indicate, what is doubtless the correct rule, that actual knowledge must be brought home to the party sought to be charged with it, and that constructive notice would be regarded as insufficient. The *onus* of giving full and complete information is fairly undertaken by a bank which enters upon an eccentric course of dealing. In Franklin Bank *v.* Steward,[3] it was said, that the cashier's "true position appears to be that of a general agent for the performance of his official and accustomed duties. While acting within the scope of this authority, he would bind the bank, although he might violate his private instructions." The case of Lloyd *v.* West Branch Bank[4] is perhaps even stronger than any of the others. For though the judge in that case is considering not

[1] 22 Wend. 348.
[2] 3 Mason, 505.
[3] 37 Me. 519.
[4] 15 Penn. St. 172.

the case of a circumscribing vote of a directorial board, but the actual charter of the bank itself, he does not hesitate to apply the same principle. The decision is rather striking by reason of the vigor and oddity of its expression, but it is certainly sound. It is, briefly, to the effect that recognized and known functionaries, especially the officers of a bank, are held out to the world as having authority to act according to the general usage, practice, and custom of the business in such institutions. Otherwise there could be no safety for the public in doing business with them. Their charters differ in some respects, and individuals cannot be presumed to "carry these documents in their pockets as a *vade mecum*." The acts of officers therefore, in the scope of such general usage, practice, and course of business, bind the corporation in favor of third persons who did not know at the time that the officer was exceeding the course of his authority. In the Commercial Mutual Marine Ins. Co. *v.* Union Mutual Ins. Co.,[1] which, though not a bank case, yet covers the point now in discussion with great thoroughness and accuracy, — a contract made by the president in contravention of secret limitations was upheld. The court declared that, in order to show that the corporation held out their officer as competent to make such a contract, it was sufficient evidence to show an usage among such companies to make such contracts through that officer. In Neiffer *v.* Bank of Knoxville,[2] a contract, made not in accordance with the provisions of the charter, was nevertheless upheld on the ground that customarily such a contract could have been made by the officer who had in this case irregularly undertaken to make it; and that therefore it should be enforced in favor of the third party who had entered into it in good faith, and in ignorance of the charter restriction.

The cases, it will be observed, relate especially to the acts of cashiers; a natural circumstance, fully explained by the fact that the cashier is the chief executive officer, and naturally his

[1] 19 How. 318. [2] 1 Head, 162.

acts are more often the subject of controversy than those of other officials. But the general principle which runs through the decisions is equally applicable to a president, teller, or other agent whomsoever. None of the above cases deny or infringe the statutory right of defining, restricting, or limiting official powers. On the contrary, nearly all of them in terms distinctly recognize the power of the directorial board, or the government of the corporation, to prescribe, either with the effect of enlargement or circumscription, the functions of any officer. They only superadd to this right, making no distinction, as we have above pointed out, whether it owes its existence to common law, charter, or general statute, the duty of bringing home knowledge of their action to the individual dealing with the officer, whenever in the absence of such knowledge he would naturally be deceived and injured, by relying simply upon the usual course and usage of banking business. Since the power to define and limit does exist, it must be supposed to have some value, and the language of the statute must be allowed to describe some substantial privilege. The power is indeed valuable and the privilege substantial, and no definite limit can be set to either, provided only, that the one requisition is complied with of giving due and sufficient notice of its exercise in any instance. It must then necessarily affect and bind the party notified. Two English cases well illustrate this rule. A cashier indorsed negotiable paper, which ordinarily he would have been empowered to do by the inherent authority of his office. But he preceded this indorsement by the words "*per proc.*" He was in fact acting under a peculiar and special authority, distinct from that ordinarily vested in him by his office; and these words were intended to notify the dealer of this circumstance, and were words customarily having this warning or admonitory significance. The court held that the notice that the authority was special and peculiar, and therefore wholly distinct from that appurtenant

to the cashier as such, was sufficient.[1] In fact the cashier, though doing an ordinary act, was not doing it under his general official authority, but under an independent and unwonted delegation of power. The words prefixed were, by their well-known meaning, equivalent to a direct statement to this effect to the dealer. He was then put upon his inquiry if he wished to ascertain precisely the nature and extent of the special authority. If he did not care to be at the pains of satisfying himself on this point, but relied on his opinion of the cashier's character or simply yielded to indolence or carelessness, any resulting loss must properly fall wholly on him. He had received a full and sufficient warning that the cashier was not in this matter authorized to deal with him by virtue and in the exercise of his customary official authority, and he could not afterward be allowed to appeal to that customary official authority to support the regularity and validity of an act which he was distinctly notified at the time was not done under it.

If an officer is acting, speaking, or receiving information in matters which the ordinary usage of the banking business cast within the range of his functions, the bank is bound and affected thereby, as any other principal, by the act, declaration, or knowledge of the agent.[2] No corporate vote is necessary to give validity to a contract made by an agent in a matter concerning which he has, from any source, the power to contract.[3] But no officer can bind or affect the bank by any dealing in the department allotted to another officer. The bank, in appointing various officers, is simply creating various perfectly distinct and independent agencies. Each agent can act only in his own agency. In like manner, demand or notice can affect the bank

[1] Alexander v. Mackenzie, 6 C. B. 766; Stagg v. Elliott, 12 C. B. N. S. 373; s. c. 31 L. J. J. C. P. 260.

[2] Wyman v. Hallowell & Augusta Bank, 14 Mass. 58; Salem Bank v. Gloucester Bank, 17 id. 1; Hartford Bank v. Hart, 3 Day, 491; Hooker v. Eagle Bank, 30 N. Y. 83; New Hampshire Savings Bank v. Downing, 16 N. H. 187.

[3] Eastman v. Coos Bank, 1 N. H. 23; Lime Rock Bank v. Macomber, 29 Me. 564.

only if it be made upon or given to the officer having charge of the subject-matter which the notice concerns. If it be given to one within whose sphere the business in question does not fall, the bank is not chargeable with it; neither answerable for negligence if it fails to act upon it.[1] For example, the book-keeper of a bank has nothing to do with its litigation, and notices in a lawsuit served upon him would not be valid as notices served upon the corporation. So it has been held in an adjudicated case,[2] that knowledge on the part of a clerk in a bank of the residence of an indorser on a note would not prevent the holder of the note from asserting and availing himself of the ignorance of this by the proper officers of the bank. Their ignorance was the ignorance of the corporation; but the knowledge of the clerk was not the knowledge of the corporation.

Upon the same principle it has been also held that to make a subscriber's payment of his subscription money for capital stock a sufficient payment and binding upon the bank, it must have been made to an officer authorized to receive it.[3] So where the bank has a receiving-teller, whose proper province it is to receive deposits, the bank is not liable to reimburse a depositor who has handed in his funds to the book-keeper, if it happens that, after their receipt by that improper and unauthorized officer they are lost or embezzled before they come to the hands and possession of some one whose special function it is to receive or to keep them.[4] On the other hand, the bank has been held liable to reimburse in a case where its manager had succeeded in obtaining and misappropriating the money of a customer, inasmuch as in the conduct of the transaction the officer had done no act which was not strictly within the scope of his legal functions, and had induced the customer to believe

[1] Goodloe *v.* Godley, 13 S. & M. 233; Commercial Bank of Manchester *v.* Bonner, id. 649.

[2] Goodloe *v.* Godley, 13 S. & M. 233.

[3] State *v.* Commercial Bank, 6 Sm. & M. 218.

[4] Manhattan Co. *v.* Lydig, 4 Johns. 377.

that he was acting simply in the regular and ordinary course of the business of the banking-house.[1] We see therefore that no act binds the bank unless done by the officer actually empowered, or whom the customer has a right to believe empowered, to do it; and that every act done by an officer within this scope will bind the bank. The rule will hold good even though the act is in fact fraudulent, provided the customer has no knowledge of the fraud, but is himself dealing *bona fide*, and believes the official to be dealing in the like good faith in the business of his principals.

From the preceding paragraphs it is obvious that one sufficient method of holding out an agent to the public as competent to act on behalf of the corporation in certain matters, is simply to invest him with the title of the officer customarily authorized to act in those matters for banking institutions, according to the ordinary course of the banking business. Another and a very simple and unquestionable method of holding out, is by allowing an officer repeatedly to perform any specific act, and recognizing his performance as proper and valid. Long usage implies authority equally with an express resolution.[2] It has been said that a corporation is not bound by an act of its agent simply because it has been his previous practice to do similar acts, unless knowledge of this previous practice is brought home to the corporate government.[3] As a broad statement in technical terms of a legal doctrine, this is unobjectionable enough. But it should be understood that the knowledge may be such as arises or is implied by imperative implication of law, as well as knowledge which exists in fact. The directorial board of a bank, which is its corporate government, and which for all legal considerations is in fact the cor-

[1] Thompson *v.* Bell, 26 Eng. L. & Eq. 536.

[2] Hoyt *v.* Thompson, 1 Selden, 320; Elwell *v.* Dodge, 33 Barb. 336; Lloyd *v.* West Branch Bank, 15 Penn. St. 172; Lohman *v.* N. Y. & Erie R.R. Co., 2 Sandf. 89; Northern Central Railway Co. *v.* Bastian, 15 Md. 494; Dougherty *v.* Hunter, 54 Penn. St. 380.

[3] Lawrence *v.* Gebhard, 41 Barb. 575

poration itself, is obliged to meet frequently, and to keep a close and constant supervision over the daily course and conduct of its business. In many species of corporations the position of director is almost a sinecure; the board constitutes only a sort of advisory body, which may meet only on comparatively infrequent occasions, to discuss large and important questions concerning the general business policy of the corporation. But it is not thus with banks. Their directors are bound to constant activity and thorough acquaintance with the daily course of the affairs and dealings of the institution. It is their duty to make this acquaintance so thorough that no officer can continue long and consistently to usurp a function of any degree of importance whatsoever without their knowledge. Unquestionably the public has a right to suppose that this board, which probably meets several times in a week with the express duty of inquiring into the proceedings of the one, two, or three days which have intervened since their last convention, has an ordinarily accurate knowledge of how those proceedings are usually and uniformly conducted. This is an obvious duty of the board, and therefore strictly of the corporation; for the board is, in the eye of the law, the corporation. The community are entitled to assume that the board or corporation do their duty, and can hold them liable for the results of their neglecting it. So if a board of bank directors suffer the assumption of a certain function by their cashier or teller to grow into a usage, it is not to be conceived that they could be heard to say that they had never had any knowledge of his conduct, and so shift the mischief of their own default upon the shoulders of an innocent third person. In other words, instead of its being necessary that the practice of the officer should have been brought to the *actual* knowledge of the government, it must suffice to show that such practice has continued so long and has been so public that it must have been brought to the knowledge of the government had not that body

been unduly lax and careless in the performance of its duties.[1] A board of bank directors, with responsibilities so much greater and duties so much more exacting than fall to the lot of directors in the majority of other species of corporations, must be very quickly held to a knowledge of any practice which grows up among their subordinates. In Minor *v.* Mechanics' Bank of Alexandria,[2] it was said that it is a presumption of law that the ordinary usage and practice of a bank, "in the absence of counter proof," results from regulations of the directors. What "counter proof" would be regarded as sufficient, or what species of evidence would be admissible as going to constitute "counter proof" is not intimated. But it would seem that law and justice would equally require that only evidence going to show that such was not in fact the ordinary usage and practice of the bank, or that the circumstances attendant upon it were not such as to give the public or the individual a conclusive right to regard such usage and practice as being established and binding, should be allowed. To allow the bank to show more than this, by way of "counter proof," would in effect be to enable them to make others suffer for their fault. The "interests of the mercantile world" should be imperative in this matter.[3]

But this doctrine, that the authority of an officer as against the bank, may be implied from, and may be sufficiently proved by, showing a public holding out, a tacit acquiescence, an usage or ordinary course of dealing in the institution, is subject to one very important and perfectly established limitation. These facts only suffice to confer upon the officer *just as much* authority in the premises as he could have derived from an empowering resolution of the board of directors, or from corporate action in the matter. Whatever limitation there is, if any, upon the functions which the government of the corporation

[1] Beers *v.* Phœnix Glass Co., 14 Barb. 358; Smith *v.* Hull Glass Co., 11 C. B. 897; 9 Eng. L. & Eq. 442.

[2] 1 Pet. 46.

[3] Andrews *v.* Kneeland, 6 Cowen, 354.

can by their direct vote enable him to assume, that same limitation equally curtails the functions which usage, acquiescence, or public holding out will enable him legally to do on behalf of the bank. If any official undertakes to exercise any authority with which the corporate government have no legal right to invest him, he does not in its exercise bind or affect the bank, no matter how old, how well known, or how frequent has been the previous practice.

In Minor *v.* Mechanics' Bank of Alexandria, *supra,* it was said that the power by implication would be held good, *provided* it were one which could be conferred by a written vote of the board of directors. Circumstances may be shown, among which are especially usage and holding out, which dispense with proof of the vote, and either estop the corporation to deny it or make its supposed existence a conclusive presumption of law. But this does not affect the imperative requisition that such a vote, *if it ever had been passed,* should have been legal and valid, and within the powers of the board. Since no one can allege ignorance of the law, persons dealing with the bank are held to know those limits which surround the *possible* powers of each particular officer, and which can be extended by no process whatsoever, be it by the most perfect of usages or by the most formal of votes. Though, according to the quotation already cited from Lloyd *v.* West Branch Bank, knowledge of the contents of the corporate charter cannot be demanded of the members of the business community. If one deals with an officer beyond these described limits, there is nothing which he can prove which will protect him. If it is matter of law that a certain function or act falls exclusively or inalienably within the range of the powers and duties of one officer, no state of affairs can cause the performance of that function or act by another officer to affect or bind the bank. There are such exclusive and inalienable functions in the various officers, as will be seen hereafter; and it behooves the public to become acquainted with them, since usurpation of each other's functions,

though often innocently done through ignorance and mistake, by bank officers is not uncommon, and frequently, by force of the above doctrine, works a mischief to the customer which the law is impotent to cure. The case of the Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank[1] furnishes a good example in this matter. Selden, J., delivering the opinion, said that though a custom for a cashier or a teller to certify a check might be perfectly good, yet it was subject to the limitation that it could only be good where the drawer had funds in the bank. In the case under consideration the drawer had not funds and the holder was aware that he had not. The legal limitation of the power of certifying, which rendered certification under these circumstances invalid, was a rule of law which the holder of the check could not be heard to declare himself ignorant of. It was an absolute rule of law, and the holder must be held to know that it was such and that nothing could dispense with its operation. Knowing the deficiency of the drawer's assets, he ought also to have known that as an unavoidable consequence the certifying officer was exceeding the *possible* limits of his authority. The loss therefore must rest upon him for having accepted a certification which the law would conclusively presume that he knew to be invalid.

Ratification.

In like manner a bank may, in the same way as any other principal, ratify after performance unauthorized acts of its agents; such ratification may be direct, or it may be presumed from the ordinary circumstances which constitute practical ratification in the eye of the law, as, for example, from its receiving the benefit of the acts.[2] But of course it could not ratify acts of the nature just discussed, where an officer undertakes to act in a matter in which the law absolutely forbids him

[1] 16 N. Y. 125. To precisely the same effect is the case of Mussey *v.* Eagle Bank, 9 Met. 306. See also Salem Bank *v.* Gloucester Bank, 17 Mass. 1.

[2] Lime Rock Bank *v.* Macomber, 29 Me. 564; Hooker *v.* Eagle Bank, 30 N. Y. 83.

to act. That cannot be made legal, after performance, which could not have been rendered legal before it. Thus if a president or a cashier of his own sole motion should effect a discount, he would trench upon an inalienable function of the directors. His act would be not voidable but absolutely void, in direct contravention of a law which the directors could by no action of their own abrogate or affect. Since they could not have originally conferred on him power to do the act, so they must be equally unable subsequently to render valid his assumption of the power. The money advanced by the bank could of course be recovered in an ordinary action of debt. But the contract of discount, strictly as such, could never be confirmed by the directors, or sued upon or enforced by either party. It must be absolutely and irremediably void. On the other hand any act which the directors could originally have empowered any officer to do, they may ratify, after he has done it without original authority. Thus a cashier has no power to engage counsel for the bank in a lawsuit. But it is a duty which the board can at any time by their vote impose upon him. So if he does retain counsel of his own sole motion, his act may be afterwards directly or indirectly accepted by the board on behalf of the corporation.

Irregular and Wrongful Acts of Officers.

Unless under very peculiar circumstances a bank will not be held liable to make good such acts or undertakings of their officers as are unwarrantable, unusual, or indirectly in contravention of any law.[1] How far and in what classes of cases they are liable for the results of dishonest or erroneous acts is a very

[1] Wyman *v.* Hallowell & Augusta Bank, 14 Mass. 58; where the question was whether a bank could be bound to pay the bank notes and bills of its predecessor, of the same name, by reason of promises to that effect made by its president and cashier. Lloyd *v.* West Branch Bank, 15 Penn. St. 172; where the cashier had received, without consideration, a bundle of notes "the issuing of which had been interdicted" by a statute. Foster *v.* Essex Bank, 17 Mass. 479.

interesting question, upon which, strange to say, there are few authorities. Though fortunately among those which we have, the elaborate, thorough, and luminous opinion delivered by Parker, C.J., in the case of Foster *v.* The Essex Bank, stands forth as a valuable disquisition upon this subject, and is worth a long array of naked decisions. The facts in this well-known case were as follows: A cask of gold doubloons was left with the bank for safe-keeping, the circumstances of its reception constituting in the opinion of the court a purely gratuitous bailment. It was kept in the bank vaults with precisely the same care with which the funds and property of the bank were kept. But the cashier of the bank, with the connivance of a subordinate clerk, stole from the vaults a quantity of bank property, and also a considerable amount of this gold. It was no part of the duty of either the cashier or clerk to open or meddle with the keg in which the doubloons had been secured by their depositor; and no officer of the bank had, from the nature of the mandate, any right to examine or so much as touch the contents of the keg. The counsel for the plaintiff urged that the principal was liable for the tortious act of its agent, the cashier. But the court said, upon the authority of the Mechanics' Bank *v.* Bank of Columbia,[1] that the liability of the principal depends upon the facts, 1. That the act was done in the exercise, and 2, within the limits, of the power delegated. For example, for money credited in the books of the teller, or proved to have been deposited with him though not credited, the bank is answerable. The inquiry then in this case must simply be, whether when the gold was taken from the cask by the cashier and clerk they were in the course of their official employment. Their master, the bank, had no right to meddle with or to open the cask; it neither could delegate, nor did it attempt to delegate, any authority to any of its officers so to do. It was not within the duty of the cashier to know, or to take any account of, the contents. He was not therefore acting within the scope

[1] 5 Wheat. 326.

of his authority when he committed the villany; and the bank is no more answerable than if he had stolen the pocket-book of an individual from the bank counter. "If then," the learned judge proceeds, "it be asked, for what acts of a cashier or clerk the bank would be answerable; I should answer, for any which pertain to their official duty; for correct entries in their books, and for a proper account of general deposits; so that, if by any mistake, or by fraud, in these particulars, any person be injured, he would have a remedy.[1] . . . For the correct conduct of all their servants, in their proper sphere of duty, they are answerable." In this especial case, "if the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault when banking hours were over;" but neither to open the keg, nor to touch its contents. The bank is "not answerable for special deposits, stolen by one of their officers, any more than if stolen by a stranger; or any more than the owner of a warehouse would be, who permitted his friend to deposit a bale of goods there for safe-keeping, and the goods should be stolen by one of his clerks or servants.

"The undertaking of banking corporations with respect to their officers, is that they shall be skilful and faithful in their employments: they do not warrant their general honesty and uprightness. And it is the same with individuals."[2] The cited case of Finnucane *v.* Small "is in all respects like the one before us, except that the goods were to be kept for hire," a difference altogether in favor of the present defendants. In answer to this case it was observed in argument that "the cashier of the bank was trusted and therefore the doctrine of Lord Kenyon did not apply. But if we are right in the principles before stated, he was not trusted in this business; neither he nor his principal, the bank, having any thing to do with the

[1] To the point, that the bank is liable for frauds or mistakes of the cashier or clerk in their entries in the books of the bank and in false accounts of deposits, may be cited also Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Gloucester Bank *v.* Salem Bank, id. 33; Andrews *v.* President, &c. of Suffolk Bank, 12 Gray, 461.

[2] Citing Finnucane *v.* Small, 1 Esp. 315.

chest or cask, but to give it a place in the vault, and to lock it up when the hours of business were over; and so the cashier must be considered like the servant in the case cited."

It was acknowledged by the counsel for the bank, in this case, that a more difficult question would have been presented had the board of directors, or their predecessors, shown any negligence in the original appointment or the subsequent retention of the defaulting officials. Had these persons borne bad characters, or had circumstances of suspicion or demanding inquiry come to the knowledge of the board, or had the board for any reason been unwilling to trust their own property with them in the same manner in which they trusted the property of the bank, then the plaintiff might have had a better case. No adjudicated cause aids us in determining what redress, if any, the law would allow to the sufferer who had lost a special deposit under such circumstances of additional aggravation. An opinion must be matter of speculation. Very probably he might be allowed to recover. But if he were it is obvious that his action could not, as in this case, be *assumpsit*. It should be an ordinary action on the case for damages, laying an injury or loss directly resulting from the wrongful default of the corporation. The chief difficulty to the success of the plaintiff in such a suit would probably be in showing that the default of the directors was in fact the *causa proxima* of his mishap. It would of course be easy to show that it facilitated the occurrence of the mishap, but the only immediate cause in the eye of the law might perhaps be regarded as the felony of the officials.

Upon this point the same volume of Massachusetts Reports, which is peculiarly rich in interesting and ably argued bank cases, contains a valuable decision. The facts of the case of the Salem Bank *v.* The Gloucester Bank[1] were these: A large number of the bills or notes of the bank were prepared for circulation, and were signed by the cashier. They only needed

[1] 17 Mass. 1.

for their perfection the signature of the president. This however they did not receive, and they were kept in this condition for several years, lying in the cashier's desk in the open room of the bank. Thieves broke into the bank, and attempted to break its vault without success. But they broke open the desk and stole the incomplete bills, forged the president's signature upon them, and put them in circulation. The holders sought to recover, among other pleas, under a declaration for damages, alleging that their loss was the result of the excessive and wrongful negligence of the bank in allowing notes so nearly perfect to lie in so exposed a place. Of course no business man could deny that practically the manner in which these notes were kept was unpardonably careless. Had they been in the vault, it was practically proved that they would have remained intact, since the vaults were not opened. But the plaintiffs were not allowed to recover. The court said that for the "indirect and remote consequences of the negligence" the corporation was not answerable. They did not leave finished notes in this exposed condition, but only paper which required the further and independent act of forgery, an act which is a felony, to make them capable of working a deception. The neglect was only *causa remota*, and the bank could not be held. The decision is clearly reasoned and perfectly satisfactory in law. Unfortunately its value is rather negative than positive, for it furnishes very little aid towards the determination of what species of directorial negligence the results would be regarded as sufficiently immediate to be answered for by the bank, and no other cases supply this deficiency. It should perhaps be remarked that it was not intimated in this case that the directors had been in any default in choosing or keeping a cashier whose character they ought to have known to be such as to render him unfit for the responsibility imposed upon him.

Presumptions of Regularity.

If the officer or agent of a corporation is clothed with a certain power, either by charter, statute, or by the lawful act of the corporation, and if he uses that power for an unauthorized or even prohibited purpose, or fraudulently, yet the corporation will be answerable for his action to any innocent third person affected thereby.[1] Ordinarily, whenever the act is one not upon its face illegal, or in excess either of the general corporate powers or of the powers which the officer undertaking it may legally exercise, and is held out as authorized to exercise, regularity is always presumed in favor of any person who had no notice contravening the correctness of these appearances. The principle is general, applying to all corporations. But many interesting and important decisions in bank litigation depend upon it, and seem worthy of mention. In the Farmers' and Mechanics' Bank of Kent County *v.* Butchers' and Drovers' Bank,[2] the teller, duly authorized to certify a check if the drawer had funds in the bank, certified the check of a drawer who had no funds. The certification under the circumstances was clearly unauthorized; but the holder had no notice of the facts which rendered it so. Mr. Justice Selden, delivering the opinion in the New York Court of Appeals, said: The bank leads persons to put confidence in its teller, through whom they are obliged to deal with the bank. For his acts, therefore, within the scope of his employment and authority, so far as can be known, the bank must be responsible. Here the fact of whether or not there were funds was one which could only be learned by asking the teller himself. Knowledge that he could not certify without funds is not knowledge of the extrinsic fact that there are no funds. A check taken on the

[1] Sheehan *v.* Davis, 17 Ohio St. 571; Madison & Indianapolis R.R. Co. *v.* Norwich Saving Soc., 24 Ind. 457; Barnes *v.* Ontario Bank, 19 N. Y. 152; Curtis *v.* Leavitt, 15 id. 9; Leavitt *v.* Yates, 4 Edw. Ch. 184; Stoney *v.* Amer. Life Ins. Co., 11 Paige, 635; Gillett *v.* Campbell, 1 Den. 520.

[2] 16 N. Y. 125.

faith of the officer's representation that he has *authority to certify* does not bind the bank, if he had really no such authority. But, provided he has the authority, then a check taken on the strength of his representation that there are funds, binds the bank, unless the holder knows as a fact that the representation is false. The sound rule seems to be, that where a party dealing with an agent ascertains that the agent's act corresponds exactly with the terms of the power, he may take the agent's representation as to any *extrinsic fact*, peculiarly within the agent's knowledge, and not ascertainable by a comparison of the power with the act done under it. The distinction is clear, and is well put by the learned judge. The bank does not hold out the officer as authorized, and he is not authorized, to state what are or are not his proper functions. But all his acts, however irregular or fraudulent, done in pursuance of a function, which as a matter of fact the bank has in any manner made properly his, must affect the bank, if the party dealing with him acted in good faith. To the like effect was the holding in *Ex parte* Overend, Gurney, & Co.[1] Acceptances made by an officer duly authorized to accept upon the receipt of collateral security, but who in this instance had accepted without such receipt, were holden good as against the bankers in the hands of a third party, holding for value and ignorant of the facts which had rendered the acceptance really irregular and unauthorized.

Where a bank president, by fraud and collusion between himself and the payee of a draft drawn on the bank, raised money dishonestly upon the draft by the wrongful use of his official powers, it was held that a *bona fide* indorsee for value of the paper might recover thereon from the bank.[2] So if negotiable paper be indorsed for accommodation solely, it is irregular and even illegal; and is of course an unauthorized and wrongful act on the part of the officer doing it. Yet if the in-

[1] Law Rep. 4 Ch. 460.

[2] Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256.

dorsement of the negotiable paper of the bank is the proper function of this officer, the bank will be bound to the holder of this wrongfully indorsed paper, provided he came by it in due course of business, and without notice of the fact that the indorsement was for accommodation.[1] Though by the principle already laid down, holding the taker to knowledge of the law provided he has knowledge of the facts, if he had been aware that it was solely an accommodation indorsement he could not have recovered on the ground that he did not know but that the officer might be authorized to make such. The absolute and necessary illegality, the impossibility of its being legal except perhaps by virtue of special legislation, which no one can assume, is a principle of law which everybody is imperatively presumed to know. So with the ordinary statutory requisition that all formal contracts of the bank shall be signed by the president and cashier. The contracts must be first made by the directors, for power to sign is not power to make, and then only does the function of the president and cashier come in. They are authorized to sign contracts which have been thus previously entered into; but they are authorized to sign none others. For none others are in fact contracts of the bank. So if they do sign others, it is an unauthorized exercise of a power or duty, which yet properly inheres in them. But it has been strongly intimated that their signatures should be regarded as conclusive of the validity of a contract, in favor of third parties affected thereby and ignorant of the irregularity lying behind this undue procedure, but done *prima facie* in strict pursuance of an existent function.[2]

Two other isolated cases, not easily to be placed under any very general classification, in which banks have been held liable, may be noticed here, probably more appropriately than in any other connection. The first is that of Tracy *v.* Tal-

[1] Mechanics' Banking Ass'n *v.* N. Y. & Saugerties Lead Co., 23 How. Pr. 74; Bank of Genesee *v.* Patchin Bank, 3 Kern. 309.

[2] Gillett *v.* Campbell, 1 Den. 520.

mage, president, &c.[1] The plaintiff sold stocks to the bank and received in payment notes of a description which the law prohibited the bank from issuing. He was considered to be so far affected with a knowledge of the law that he could not recover on the illegal notes. But it was held that he was not *in pari delicto* with the bank in any such sense as to prevent him from holding the bank liable to reimburse to him the value of the stocks sold, either in *quantum meruit* or *assumpsit*. In the second case[2] a loan was made in form to the president who gave his individual note for the amount but with the indorsement of the bank. It was held that if the loan was in fact for the benefit of the corporation, or if the lender was made to believe it to be so, and if it was within the scope of the business of the corporation, but this unusual process was resorted to solely to avoid a technical legal restriction which prevented the lender from lending directly to the corporation, then the corporation would be liable on the indorsement.[2]

Officers de facto.

The bank will be bound by the acts, within the scope of his apparent agency, of any one who is its officer *de facto*. The bank holds him out as its officer, and as having the right and duty to perform certain functions, and it is as fully responsible as if this right and duty had been, in every stage of its growth, perfect. Such facts as that he has never been regularly or formally inducted into office; that all the requisites for his entry upon the active performance of its duties have not been complied with; even that originally he was not legally eligible for the office, will not suffice to free the bank from its liability upon the acts which it has permitted him to do in its behalf. Thus directors, coming into office through formalities purporting to be legal and sufficient are directors *de facto*, and if their

[1] 4 Kern. 162.
[2] Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23.

election was actually illegal they can yet only be ousted by writ of *quo warranto*. One formally appointed cashier may bind the bank as a teller, if he is allowed as a matter of fact to perform the functions of a teller. Neither does the fact that one appointed to an office fails to take the oath or to file the bond, which may be prescribed by statute or by-laws, vitiate or invalidate any of the acts done by him during his actual incumbency.[1] In the cited case of Baird *v.* Bank of Washington, less than a quorum of the directors elected a person to fill a vacancy in their board. The proceeding was of course irregular and illegal. But the person so chosen appeared at a subsequent meeting and voted. His presence and his vote were necessary to make a majority in the quorum then present. Nevertheless the action taken at the meeting and only taken by his assistance was sustained as binding the bank, on the ground that he had come in under color of title, had never been ousted, and so was a director *de facto*.

BOARD OF DIRECTORS.

General Functions.

The general control and government of all the affairs and transactions of the bank rest with the board of directors. For such purposes the board constitutes the corporation, may act as the corporation, and unless specially restricted may exercise all the powers which the corporation is authorized at common law, or under the charter or organic law to exercise. Organic banking laws and charters customarily confer upon the board in broad phraseology the general power to conduct and manage the corporate business. But this language is practically only a recognition of the functions which the board would be entitled and called upon to exercise by the rules of common

[1] Bank of the United States *v.* Dandridge, 12 Wheat. 64; Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46; Delaware & Hudson Canal Co. *v.* Pennsylvania Coal Co., 21 Penn. St. 131; Cooper *v.* Curtis, 30 Me. 488; Smith *v.* Bank of the State, 18 Ind. 327; Baird *v.* Bank of Washington, 11 Serg. & R. 411.

law and does not operate to enlarge those functions or to designate them with any greater particularity. Neither can the duty thus conferred be construed as a requisition upon the directors to undertake the performance, in person, of all the acts called for by the daily routine of the business of the bank. It extends to such matters only as are usually and conveniently allotted to the charge of directors in the banking business. Some such acts they must perform; others they may perform. But the obligation is measured by an uniform usage prevailing among banks universally. Their personal execution may be restricted to the matters thus designated, unless others be specifically named or added in the law. Besides a variety of specific acts which they must initiate or wholly do, this uniform usage imposes upon them the "general superintendence and active management" of the corporate concerns. They are bound to know what is done, beyond the merest matter of daily routine; and they are bound to know the system and rules arranged for its doing. So though it has been said that powers of a public character given by the legislature to any body of individuals can never be sub-delegated by the recipients, yet this doctrine has never been allowed to prohibit bank directors from appointing agents and endowing them with sufficient powers for executing the resolutions of the board and carrying on, without specific authority in each individual case, the ordinary transactions of daily business.[1]

Accordingly they may delegate to a committee of their own number power to mortgage real estate of the corporation, including as a necessary implication power to execute and deliver the ordinary and proper instruments.[2] Although dealings in real estate are of the most dignified and formal character of any dealings in the eye of the law; yet general supervision even of these satisfies the duty of the board. All beyond this

[1] Burrill v. Nahant Bank, 2 Met. (Mass.) 163; Ridgway v. Farmers' Bank, 12 Serg. & R. 256.

[2] Burrill v. Nahant Bank, 2 Met. 163.

may be delegated. They may empower the president alone, or the president and cashier conjointly, to borrow money on behalf of the bank, to indorse its promissory notes, to obtain discounts for its use; these powers also including the power to make delivery of the paper thus negotiated. It seems also that these powers may be conferred not only by a special vote passed with a view to a single occasion, but also by a general resolution looking to their frequent exercise on various occasions.[1] Though votes of this broad nature unless very cautiously indulged in are likely often to be improper and in some degree unsafe. For if they appear to go too far in throwing within the discretion of others the decision of weighty matters covering a wide ground of responsibility, they would amount to an effort in a measure to delegate the "management" of the business of the bank. To this extent the board of directors cannot go. Within reasonable and moderate limits, so narrow that their general supervision must practically cover all that their delegates can possibly do within them, they may confer powers by a general resolution, which may be valid for an indefinite period and for any number of separate transactions. But authority so large as to transfer in an important degree the control of the corporate affairs they could not confer.

Thus the making of discounts is an inalienable function of the directors. They cannot part with it, or invest any officer or officers with it. It rests in them alone and exclusively. It is a power of that degree of vital importance that it cannot be taken out of the policy of the general principle that powers of a public nature, given by the legislature, cannot be sub-delegated.[2] The legislature imposes upon the board the duty of taking charge of all those matters of business upon the wise and skilful conduct of which the prosperity of the institution and the safety of persons dealing with it depend. This duty

[1] Ridgway v. Farmers' Bank, 12 Serg. & R. 256; Merrick v. Bank Metropolis, 8 Gill, 59; Fleckner v. Bank of the United States, 8 Wheat. 338.

[2] Lyon v. Jerome, 26 Wend. 485.

they cannot shift in whole or in part upon others, and it covers no department of banking business more unquestionably than the making of loans and discounts. The cited case of the Bank Commissioners *v.* Bank of Buffalo, if carelessly read, might seem to give the directors power to confer upon the financial officer of the bank a general authority to discount. But a more careful examination serves to show that quite the contrary was intended, and that the case really illustrates the doctrine of the last preceding paragraph. The board may give the financial officer by a single resolution power to make a considerable number of discounts or loans, provided they be requested. But this single resolution must name the person or persons to whom the loans may be made, the aggregate sum which they must never exceed; the time; and such other particulars as the directors may deem of moment. Thus in fact though many separate acts may be authorized by this one vote, yet nothing is really done beyond the supervision of, or without the active exercise of their discretion by, the directors. They may order the cashier to let A. have such loans as he shall wish, in such sums and at such times as he shall ask, within a certain period, up to the amount of a designated sum, to run for specified times, at rates of interest named, and upon designated conditions concerning indorsers, or collateral security. This does not leave each individual discount made to A. to be passed upon by the directors; yet in fact no discount is made to him by any official authority other than that of the board or at the substantial discretion of any person save the directors. Such is unquestionably the real thread of legal principle which runs through the cases cited in this and the next preceding paragraph. It alone can make them intelligible and consistent with established rules.[1]

The ordinary executory functions of the various officers of the bank are necessarily not affected by the statutory delega-

[1] Bank of the United States *v.* Dunn, 6 Pet. 51; Bank Commissioners *v.* Bank of Buffalo, 6 Paige, 497; Percy *v.* Millaudon, 8 La. 568.

tion of the management of all corporate affairs to the board. Management is not identical with execution and does not intend execution. Checks are drawn, notes and bills indorsed, deposits received, drafts paid, and the like transactions conducted as matter of course by the appropriate customary officers without any authorizing vote of the directorial board. These matters do not constitute the "management" of the bank, nor interfere with the "control" of its affairs. They are properly the medium through which that management and control are introduced in the practical transactions.

It has been held also that a banking corporation may divide the total of its business into various distinct departments, choosing a separate board of directors to have control of each respectively. Or it may have but one board, and divide it into committees, conferring upon each committee supreme power in its appropriate department. Then the resolutions of each committee within the scope of the business allotted to it will be equivalent to and of the same effect as similar resolutions of the entire board.[1] But in the latter case the powers intended to be exercised by each committee should be distinctly conferred upon it, as in any other case of delegation of authority. The mere nomination of two or three among the directors to constitute a "finance committee," may impose duties or especial watchfulness and supervision upon them, but without some further delegation of real power to them it does not give them the supreme control and management of all the financial transactions and business of the bank. Their duties rather than their powers are enlarged. The intent to increase the authority which they already have, if individual directors can be properly said to have any authority at all, must be expressed in some more clear and precise manner than by the simple act of giving the name of "finance committee" to A. B. and C. D. out of the whole number of the board. So it was held in New York that the president, cashier, and "finance

[1] Palmer v. Yates, 8 Sandf. 187.

committee" of the board could not mortgage corporate real estate without the concurrence of the board of directors; although practically the president and cashier had been wont to exercise very large authority and discretion in the management of the bank's affairs. The finance committee as such enjoyed no increase of power.[1]

The bank is bound by the action of the majority of the board, taken in the manner usually adopted by the board, no matter how informal or peculiar that manner may be. An expression of the will of the majority is what the law looks for and recognizes.[2] When a quorum of the directors are assembled at a legal meeting they will bind the bank by their proceedings, even though the remainder of their number have had no notification of the meeting.[3] But though the action of the quorum may be valid as the action of the corporation under such circumstances, yet it by no means follows that they may not themselves be in fault if the failure to notify all the members of the board was not absolutely unavoidable. It is the duty of every director to be present at every meeting of the board. Clearly the responsibility which rests upon him as a part of the government of the corporation gives him the absolute right to demand that due notice be given him of all meetings of the government for deliberation or action. The directors have no power or discretion, directly or indirectly, to debar any one of their number from the exercise of all his rights, *a fortiori* from the performance of all his duties. Not even the conviction, honestly entertained by all the rest, that one of the members is secretly hostile to the real interests of the bank, will authorize them to refuse him any of those means of scrutinizing its affairs which ordinarily pertain to his incumbency in office. Even the formality of a by-law is impotent to deny him access to the books and accounts. A by-law assuming to do so is simply invalid. The

[1] Leggett *v.* New Jersey Banking Co., Saxt. 541.
[2] Bank of Middlebury *v.* Rutland & Washington R.R. Co., 30 Vt. 159.
[3] Edgerly *v.* Emerson, 8 Fost. 555.

effort is sufficient and proper ground for the granting a writ of *mandamus* in favor of the excluded official; and the writ may be directed not alone to the other directors, but also to any subordinate officer who has assisted in the attempt to prevent the ousted petitioner from exercising any of his legal functions. The supposed hostility even if it should be proved would furnish no valid cause for withholding the writ.[1]

But the power of the directors over the president, at least under our present national banking act, is greater. Him, it has been declared, they may remove absolutely and at any time by their own sole action.[2] A clause in the articles of association, giving them this power, is valid, and will sufficiently authorize them to exercise it. But such a clause is in fact surplusage, for the act of Congress, sec. 11, itself directly and fully bestows the power. The construction of this section, as referring to directors and not to stockholders, the court say, is quite clear. In the case cited it was urged that no by-laws had ever been adopted by the stockholders or accepted by the Comptroller of the Currency, and that until this had been done the directors could not properly perform the act of removal. The objection however was overruled. It was not considered at all necessary that by-laws should have been adopted before a president could be chosen, be removed, and a successor appointed. The by-laws in fact could have nothing to say about the matter at all, save perhaps that they might be permitted to prescribe immaterial formalities to accompany its exercise. What the act of Congress explicitly gives, not even the articles of association could take away; much less could the by-laws interfere with it. Their formal adoption or even their existence are not necessary preliminaries to the exercise of a power which springs from a source wholly independent of them and infinitely above them in weight and authority.

[1] People *v.* Throop, 12 Wend. 183.
[2] Taylor *v.* Hutton, 43 Barb. 195.

Directors as Trustees.

The high degree of confidence and responsibility resting upon directors of corporations has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and *cestuis que trustent*, respectively. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations, in whose solvency the whole neighboring community must be at least indirectly interested. The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors, and, if the bank exercises the privilege of circulation, still a prior duty to the public at large. The law is, as it ought to be, very jealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied. It is not enough, to exculpate a director, that no actual dishonesty can be shown, that he cannot be positively proved to have been influenced by interested motives. Like a trustee he is absolutely prohibited from the performance of those questionable acts, wherein his conduct may be wholly free from blame, but where the bias of self-interest is strong and may influence him even without his own recognition of the fact. A director who wishes to keep completely within the protection of the law must look to something more than the mere integrity of his own intentions. The law is obliged to forbid a certain general class of actions in which the temptation is so great that it is wisely regarded as better to wholly remove human frailty from the possibility of yielding than to be continually plunging into darkling inquiries as to the probable purity and uprightness of sundry isolated transactions. It is possible that any person, being a director, might at a meeting of the board vote honestly, and with a single eye to the bank's welfare, upon a question in which he had an individual interest

vation. It is also possible that he yet not succeed in doing so, by quity of mental vision which such n produce. But a sound precaution ge these possibilities for a certainty. The law has with wholesome care declared that it is a duty of irector, resulting from the employment itself, not to acquire any interest in any matter adverse to that of the bank so long as he remains in office. Likewise as a trustee is allowed to make no profit from, or by the aid or use of, the object-matter of his trust; so a director is forbidden to make any profit out of his employment. Not only must he refrain from voting on questions in which he is directly interested; but he must not use his influence, resulting from his official position, to secure his own ends or his private advantage. Neither, of course, can he directly or indirectly barter this influence to any outside person upon any species of consideration moving from that person to himself. It is not enough in the eye of the law to protect him that he did not mean to prejudice the bank. If his act is open to suspicion, he will, like a trustee, be held to have violated his duty, which is, not to strive to do questionable things conscientiously, but wholly to refrain from all action or intermeddling in them, of what nature soever.[1]

It is frequently attempted to prevent, by statutory enactment, or by provisions in charters, some of the more definite and openly dangerous acts which directors might often be tempted to do for their own use and advantage. But this method is necessarily insufficient. The language, if specific, will cover too little; if general, will cover too much, and so in either case the phraseology will be easily perverted and the intent evaded on the plea of reasonable construction or necessity. The Na-

[1] Butts *v.* Wood, 38 Barb. 181; *Ex parte* Bennett, 18 Beav. 339; Benson *v.* Heathorn, 1 You. & C. Ch. 326; York Railway Co. *v.* Hudson, 19 Eng. L. & Eq. 361; 16 Beav. 485; Richards *v.* New Hampshire Ins. Co., 43 N. H. 263; Baird *v.* Bank of Washington, 11 Serg. & R. 411; *In re* Grant, 7 Moore, P. C. 141; *Ex parte* Robinson, 2 De Gex, M. & G. 517.

tional Banking Act wisely refrains from any enactment on the subject of loans or discounts made to directors. It leaves their conduct in all particulars to the supervision of the common law, which, as it has been above laid down, must be regarded as requiring only proper and efficient enforcement to render it fully equal to the task thus imposed upon it, of securing perfect purity in the administration of the bank's affairs. In the absence of legislative prohibition there is no rule of the common law which prevents the making a loan or discount to a director any more than to any other person. Only a director, applying for such a loan, must not vote or officially aid in the discussion concerning its allowance. The same principles of law will be applied to this as to other loans; but they will be rigidly enforced, and the proceedings will be severely scrutinized.[1] He must behave himself strictly like any other outside customer of the corporation. He must make his request to be acted upon by the majority of his co-directors, strictly exclusive of himself. It is probable that any circumstances of impropriety or suspicion attendant upon the fact of his making the application at all, or upon the manner of the making it or the procuring its acceptance, would be construed with a degree of stringency as against him, which would not be exercised towards an ordinary outside borrower. Under any circumstances favoritism or fear of offending are too likely to have some influence in such a transaction, and even the suspicion of them cannot be too carefully guarded against. Prudence no less than right feeling should prevent the applicant from being present at the discussion and vote.

If a statute prohibits loans to directors, a loan to a firm in which a director is one of the copartners is illegal.[2] But the mere fact, however, that the director is to be ultimately benefited by a loan is not *per se* enough to make the loan improper or invalid, even when loans to directors are prohibited by law.

[1] See Conynham's Appeal, 57 Penn. St. 474.

[2] Bank Commissioners *v.* Bank of Buffalo, 6 Paige, 497.

If the board is satisfied with the credit or securities offered by A. they may discount his note, although the amount received by him is to go to the use and into the possession of one of themselves. The question is, who is the real debtor to the bank? not what use will the debtor make of the borrowed funds? Accordingly where a statute, in terms, forbade any director to "become indebted or liable" to the bank for a sum exceeding fifty per cent of the amount of the capital stock of the bank owned by him, and a note was given to the bank by other parties, though in fact the debt was for the benefit of a director; it was held that this was not an illegal evasion of the statute, inasmuch as the note and the claim thereon of the bank were good against the signers. The case is very poorly reported, but this point seems to be deducible from it.[1]

A method frequently resorted to for securing the fidelity of directors in the exercise of their duties is to require them to own in their own right and unencumbered a certain number of the shares of the corporation. Imperfect as this must be, as a check upon men of large property, it is perhaps the best available plan. It has been adopted in our National Banking Act, which declares (sect. 9) that each director shall own at least ten shares of the corporate stock. This regulation, however, simply prescribes the requisite qualification for election to the office. If a person not thus qualified is elected and seeks to enter upon the office without qualifying by the purchase of ten shares, he may be ousted by legal process. But his acting as a director will not make him in any manner liable for this number of shares. Neither can he be regarded either at law or in equity, or for any purposes, as the constructive owner of them. His entering upon the enjoyment of the office does not in any case estop him from alleging his non-ownership of the requisite number of shares to qualify him for the position.[2] So, in England, where a person who had subscribed for twenty-

[1] Pemigewassett Bank v. Rogers, 18 N. H. 255.

[2] *Ex parte* Marquis of Abercorn, 31 L. J. Ch'y, 828; *Ex parte* Boney, 33 id. 781.

five shares was chosen a director, and acted as such, though the ownership of fifty shares was required by law in order to qualify him for the position; it was declared that he could be held liable as a contributor only for the price of the twenty-five shares, though the company was insolvent and the creditors were sufferers. A stronger or more conclusive case than this one could not be desired.

If a director commits a breach of duty in advocating, or voting upon, a measure in which he is so interested that he ought to have regarded himself as wholly excluded from the deliberation and decision upon it, yet the action of the board thereon will be valid and binding upon the corporation in favor of any innocent third person, not cognizant of or a party to the wrongfulness of the proceeding. Thus in a case where a director was jointly responsible with a debtor upon a debt owing to the bank, he was present and voted at the meeting when the board settled the debt by taking a conveyance of the debtor's real estate. It was held that the fact of his voting, however wrongful in him, nevertheless did not avoid the contract as towards the debtor, unless fraudulent collusion or the part of the debtor should be shown. The debtor had nothing to do with the correctness of the dealings taking place between the bank and its own agents and officers. He had only to satisfy himself that the board was acting within its powers.[1]

Control of Directors over the Bank's Property.

Directors can use the funds and property of the bank only for proper banking purposes, and for the strict furtherance of the business objects and financial prosperity of the corporation. Their discretion and power to manage its affairs extend only to the conducting those affairs in the best manner that their knowledge, foresight, and observation can suggest, to the end of increasing the profits and enhancing the value of the invest-

[1] Baird *v.* Bank of Washington, 11 Serg. & R. 411.

ments which have been intrusted to their charge by others. They cannot use any portion of the money for such objects of usefulness or charity, or the like, as they may consider worthy of encouragement and aid. All their transactions must be strict matters of business. They cannot make gifts from the corporate property. They cannot, without authority from the stockholders, subscribe money to any objects, however meritorious, unless with the immediate view and expectation of thereby furthering the actual worldly and material well-being of the bank. They are trustees of the property of others for this sole and only purpose, and if they appropriate any portion of the property for any other purpose whatsoever, however intrinsically deserving, it is yet a deviation from their obvious duty, both legal and moral, for it is nothing else than a clear breach of a plain and simple trust.[1]

Such an act, if upon its face perfectly regular, and within the scope of the directorial authority, and if the circumstances did not affect third parties with notice of its wrongfulness, would, as towards such parties, bind the bank. But if the real nature of the act were known to the outsider he would be held to a knowledge of its illegality arising from its not being within the ordinary agency conferred by the corporate principal upon its official agents. For directors though they are the government of the corporation are yet, no less than any subordinate officers, its agents, with a definite scope to their agency, and can only act legally within this scope.[2] If their act is such that it is the duty of the party dealing with them to know that it falls without the ordinary limits of directorial power, he will be affected by its invalidity. If the facts are known to him which show that as matter of law the directors are undertaking an act of this description, he deals with them at his

[1] Frankfort Bank *v.* Johnson, 24 Me. 490; Bedford R.R. Co., *v.* Bowser, 48 Penn. St. 29.

[2] Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Bank of Kentucky *v.* Schuylkill Bank, 1 Par. Sel. C. 180; Ridley *v.* Plymouth Grinding & Baking Co., 2 Exch. 711.

own peril if he neglects to satisfy himself that they have received a special and extraordinary authority in the particular case. If they have not, any loss he may incur is only the natural result of his own laches. Thus it is a principle of law that the directors can only use funds of the bank for legitimate banking purposes. If they borrow money intending to use it for other purposes, and the lender is aware of this intent, then their use of it accordingly will relieve the bank from indebtedness upon the loan.[1]

Also a case of misappropriation of the funds of the corporation has been held to be where the directors, apprehensive that a suit was to be instituted against them by the stockholders, used corporate funds to retain counsel for their own defence.[2] A clearer case of a wrongful misapplication and deflection of trust money from the purposes of the trust is not likely to occur.

Ordinarily they cannot voluntarily release a debt owing to the company,[3] but where the emergencies of business require it they may make a nominal, or merely apparent sacrifice of bank property, if it seems reasonably likely to redound to the substantial benefit of the institution. In the *bona fide* pursuit of this end, their power is not limited by technical restrictions which, under other circumstances, would forbid their cancelling debts owing to the bank. The case of Baird *v.* Bank of Washington shows that they may commute a debt if it seems to them practically more advantageous to do so, than it would probably be to push it at law, or to retain the naked legal claim for the full amount. In like manner if any officer of the bank is in arrear or default, it is perfectly in their power to compound and settle with him in any manner and upon any terms which seem to them to promise to secure the most complete reimbursement to the bank. Their contract of this nature can be subsequently avoided by the bank, solely on the ground of fur-

[1] Bank of Australasia *v.* Breillat, 6 Moore, P. C. 197.

[2] Percy *v.* Millaudon, 3 La. 568. [3] Stanhope's Case, 3 De Gex & S. 198.

ther fraud or dishonesty of the compounding officer occurring in the negotiation itself.[1]

In like manner it not unfrequently occurs that the wrongful or erroneous act of an officer causes a loss to the bank which he can be held liable to reimburse, but which there is reason to believe can only be recovered by a suit against some other third party. But if recourse is had to the suit against the third party, then the testimony of the officer in fault may be absolutely essential, or at least very desirable, to secure the success of the bank. Whereas on the ground that he is a party immediately interested in the result of the litigation, he must in all probable expectation be rejected at the trial as an incompetent witness, unless he is first legally and fully released from his liability to the corporation. In this dilemma it is the duty of the directors to consult solely the comparative ultimate probability of securing reimbursement to the bank from the defendant or from the officer. It may be that the amount of the loss is greater than can possibly be recovered from the officer or from his bondsmen, while the other defendant would be amply able to pay it. It may be that the result of the suit is doubtful; or that only a successful result can in reason be anticipated. Upon the consideration of such facts, the directors must conclude whether or not worldly wisdom would lead them to release the claim of the bank against the officer, or to abandon the notion of the other suit, or to sacrifice in its prosecution the advantage of his evidence. If their choice is of the first alternative, then it is not only in their power but it becomes their duty to execute to him a full, valid, and sufficient release from his liability. We say they must be guided solely by their notion of worldly wisdom in the case; unless by direct sanction from the stockholders, their feeling towards the officer, and their opinion of his conduct and character, cannot be allowed any weight whatsoever; and this equally whether this feeling and opinion would lead them to punish him to the utmost extent of their power,

[1] Frankfort Bank *v.* Johnson, *supra.*

or to pity and relieve him. The question is purely of dollars and cents, not of moral desert, of vindictiveness, or of Christian sentiment.[1]

A cognate rule forbids the directors needlessly or gratuitously to assume either actual or contingent liabilities on behalf of others. If they could ever have the right to do so, it could be only under circumstances of urgent necessity, and where interests of the bank seemed to be in some degree involved, so that a jury would be willing to regard the exceptional excuse as sufficient.[2]

But the board of course has power to part with or to pledge the property of the bank in the ordinary and due course of business, and for proper purposes. So it may assign or transfer any part or the whole of the corporate assets, of whatever description of property they may consist, in order to pay the corporate debts, or to secure preferred creditors. Its rights and powers in this respect are co-ordinate with the rights and powers enjoyed by individuals in the same situation. Whatever a merchant or a mercantile firm owing largely or more than they can pay, could legally do with their property to pay or secure their creditors, all or any of them, the board of directors can legally do with the funds of the bank.[3] This is the rule of common law. Of course it may be modified by legislative enactments imposing peculiar duties or restrictions upon institutions, seriously indebted, in failing circumstances, or fully insolvent. Such an enactment is that of sect. 52 of the National Banking Act which declares that any species of transfer of corporate property of any description whatsoever "made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed in this act, or with a view to the

[1] Lewis v. Eastern Bank, 32 Me. 90.

[2] Stark Bank v. U. S.Pottery Co., 34 Vt. 144.

[3] Stevens v. Hill, 29 Me. 133; Dana v. Bank of United States, 5 Watts & S. 223; Sargent v. Webster, 13 Met. (Mass.) 497; Merrick v. Bank of the Metropolis, 8 Gill, 59; Bank Commissioners v. Bank of Brest, Harring. Ch. (Mich.) 106.

preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." This section very distinctly deprives the directors of the common-law privileges which otherwise, according to the cited cases, they would enjoy, and leaves the test of what an individual might do no longer fully operative to determine what they may do.

Issue of Bank-notes or Bills a Function of the Directors.

If the bank has the legal authority to issue its bills or notes for circulation as currency, the power to make the issue is one of the ordinary and inherent functions of the board which the public has a right to presume is vested in, and will be honestly exercised by, the directors. The bank is held to warrant their fidelity. If the issue is attended with any error, neglect, or fraud, the resulting loss is that of the bank. For example, if there be, from any of these causes, an over-issue, the bank must yet redeem all the notes in the hands of innocent holders.[1] The transaction, falling within the ordinary scope of directorial authority, is one wherein the bank guarantees both the integrity and the accuracy of its agents.

Duty of Directors concerning unauthorized illegal Acts of Officers.

It will often happen that a subordinate officer will do an act either illegal or fraudulent, which is of such a nature or done in such a manner that it does not necessarily bind or affect the bank. Thus the conduct of a single officer may be such that if it could be construed as the action of the corporation, it would cause a forfeiture of the charter; but if it be without the direction or privity, *a fortiori* if it be contrary to the actual orders, of the board of directors, the punishment will be meted solely to the wrong-doer, and it will be considered that the nature of the case furnishes no ground for a proceeding for for-

[1] McDougald *v.* Bellamy, 18 Ga. 411.

feiture or penalty against the bank itself. But whenever knowledge of the commission of an act of this description, any or all of the possible results of which might be averted from the bank, is brought home to the directors, it is incumbent upon them at once to disavow the doings of their officer on behalf of the body corporate, to decline to allow the corporation to receive any benefit from them, and, so far as can be done reasonably and without injury, to seek to undo the transaction if it be still inchoate or imperfect. If the whole affair is completed and can no longer be repudiated or undone, or if no good or just end could be attained by the repudiating or undoing when knowledge of it first reaches the board, still it is their duty promptly to remove the official who was guilty of the misdemeanor. If they neglect these steps, if they knowingly suffer the bank to reap advantage from the wrongful conduct, or if they continue to retain the wrong-doer in the service of the bank, they will be regarded as sanctioning and adopting his acts on behalf of the bank, and it will be affected by these precisely as if they had been originally done under direction, or with the cognizance, approval, or collusion of the corporate government.[1]

The cited cases also suffice to sustain a doctrine similar to that which we laid down in discussing the possible allegation of directors that they were ignorant of the existence of a custom and usage prevalent in their bank. Such an excuse, it is intimated, would be utterly insufficient to shield the bank from the natural consequences of its officer's wrongful act. If the ignorance of the directors that a breach of law or of the charter has been committed, is due only to their own neglect of their obvious duty in the premises, they, *i. e.* the bank, will not be permitted to benefit by their own laches. If they ought to have known, and have no sufficient excuse for not knowing, the law will deal with the corporation precisely as if they had

[1] Bank Commissioners *v.* Bank of Buffalo, 6 Paige, 497; Robinson *v.* Bealle, 20 Ga. 275.

actually known. Thus if it be illegal for a loan or discount to be made to a director beyond a certain amount, and such a loan or discount is actually made, the fact that the board had neglected to examine the books and so did not know that the accounts of the bank with this director showed so large a loan already outstanding to him, is no defence whatsoever in a proceeding by the bank commissioners for the dissolution of the corporation.

Continuance in Office.

It is a common proviso that directors, once chosen, shall remain in office until a choice of successors has been made. It is a useful and convenient precaution by which accidental or unavoidable intervals are bridged over without an interregnum, than which nothing could be more injurious to the interests of the bank. Though the original term of office be limited to one year, yet it may be indefinitely prolonged under this provision. The irregularity in failing to make a choice in due season may subject the corporation to statutory penalties; but this is a different matter, and does not touch the tenure of office of the old board. The rule and its working are usually simple enough, and we have found only one case where litigation has arisen under it. Here choice of a board of directors was made, but the company was hopelessly insolvent. It was not formally dissolved, but no business whatsoever was undertaken by it for sixteen years thereafter. It was held that the last-chosen directors could not be regarded as continuing in office throughout this period, on the ground that no choice of successors had relieved them. Their neglect, not objected to, to perform any official duty in so long a time, was equivalent to their abandonment or resignation of their position.[1]

When Notice to a Director is Notice to the Bank.

It is a question of frequent occurrence and considerable moment under what circumstances a bank will be affected with

[1] Bartholomew *v.* Bentley, 1 Ohio St. 37.

notice of a fact which has not been actually and formally notified to its assembled directorial board. It is not, of course, indispensable that a formal statement should be made to the board at its regular meeting. A discussion or open mention of the matter there, however introduced, is amply sufficient.[1] But where the information remains the private knowledge of a portion only of those present it is important to know when the knowledge of this portion will, and when it will not, be considered to be the knowledge of the bank. Knowledge once received by any board of directors is in law, however it may be in fact, retained by every subsequent board, and the bank will be affected by it without a repetition of the communication.[2] When knowledge is gained by one or more of the directors, the general rule is unquestioned and is very easily stated. If the director acquired it in his official capacity, or in the course of or in relation to any special matter or function of which he had charge as an agent of the bank, then he knows it as a director and the law holds that the bank also knows it. If he acquired it, however, solely as any other private individual might have acquired it, and not officially, or in connection with his discharge of the functions of his office, or if it did not relate to any matter in which he owed a peculiar duty to the bank, he does not know it as director, and the bank does not know it by implication from his knowledge, unless, as a matter of fact, he communicates it to his co-directors, or such of them as are present at the meeting. The rule is thus stated probably as clearly and correctly as it can be in general phraseology.[3] The diffi-

[1] Bank of Pittsburg *v.* Whitehead, 10 Watts, 397. In this case it was noted as a *quære* whether publication in a newspaper subscribed for by the bank would operate as constructive notice to the bank. It is hardly probable that such a notion could be sustained; it is going much too far.

[2] Mechanics' Bank of Alexandria *v.* Seton, 1 Pet. 299; Fulton Bank *v.* New York & Sharon Canal Co., 4 Paige, 127.

[3] Custer *v.* Tompkins County Bank, 9 Barr, 27; National Bank *v.* Norton, 1 Hill, 572 (a leading authority); Bank of United States *v.* Davis, 2 id. 451; Fulton Bank *v.* Benedict, 1 Hall, 480; Fulton Bank *v.* New York & Sharon Canal Co., 4 Paige, 127; Washington Bank *v.* Lewis, 22 Pick. 24; Loomis *v.* Eagle

culty lies not so much in forming the abstraction, as in the subsequent practical application. Many cases have arisen, wherein the interpretation of the courts has been called in, not to determine the rule, but to declare whether or not the circumstances bring the case within the one or the other division of the rule. The question is whether the law will endow the receiver of the knowledge with an official and directorial character, or only with his private and individual personality at the time when he came by the information in question. It is by no means easy to establish any definite test, by which, as by a touchstone, all doubtful cases can be at once and infallibly solved, and arrayed upon the one or the other horn of the dilemma. Nothing better can be done than to give brief abstracts of two or three from among the cited cases, selected with a view to showing, as well as may be, the tendency of the courts in such causes.

In the Bank of the United States *v.* Davis a bill of exchange was forwarded to one who was a director in the bank, with the request that he would procure a discount upon it. He did so; but at the meeting which made the loan he was present and joined in all the proceedings, and there falsely alleged that the discount was for his own benefit, and dishonestly received the money. It was held that the bank was affected with knowledge of the fraud and could not recover the amount of the bill from the defrauded party. The court said that it was not true that the director was not acting at the time on the behalf of the bank. He was present, consulting, advising, doubtless recommending the loan upon this very paper, all in his capacity as director, and it is fair to suppose that his influence, as a director, procured this discount. It is urged that he was only one of five directors engaged in the transaction. But the bank having employed several agents jointly to transact a particular

Bank, Disney, 285; Bank of Pittsburg *v.* Whitehead, 10 Watts, 397; Louisiana State Bank *v.* Senecal, 13 La. 525; Powles *v.* Paige, 3 C. B. 25; 15 L. J., C. P. 217; *In re* Carew, 31 Beav. 39.

business, is equally responsible for the conduct of each and of all. The duty of any one of them to communicate his knowledge is as obligatory as if he were a sole agent. It will be seen from the language of this decision how inextricably the matter of notice is intertwined with the principle of holding the bank liable for the default of its agent committed within the scope of his duty. Indeed the rule may be expressed in the language of the latter principle as correctly as in any other form, — thus: Whatever knowledge a director acquires *within the scope of his official employment*, he is bound to communicate to his co-directors, that is to say, to the bank itself. If he neglects to do so the bank is liable for the neglect of its agent to perform the duty of his agency. By either road the same conclusion is arrived at, which is, the liability of the bank to the same extent as if it had known what its director knew and what he ought to have communicated. It may be said that it is chargeable with his knowledge, received within the scope of his agency and employment; or it may be said that it is chargeable with the result of his neglect to perform the duty of communication imposed upon him by his agency and employment. Practically it matters little which course is chosen, or whether, as in the foregoing case, an effort is made to combine both.

The case of Terrell *v.* The Branch Bank at Mobile[1] seems at first almost parallel in its facts and precisely contrary in its decision to the preceding. The opinion, though not emanating from a leading bench, is eminently sound and keen; and the contrast is well worth examination. A. signed a promissory note in blank and gave it to B., a director in the defendant bank, with directions to fill it up with the sum of "five hundred dollars" and to use it in renewal of A.'s note for the same amount already held by the bank. B. filled it up with a larger sum and had it discounted for his own benefit. He was present at the meeting of the board which made the discount, but of course did not disclose the truth. In this case his knowl-

[1] 12 Ala. 502.

edge was not held to affect the bank, and A. was obliged to pay upon the note the amount fraudulently filled in. The two cases seem strikingly alike in their facts, yet the opposite decisions in them respectively seem equally satisfactory. The point at once of reconcilement and of difference lies in this fact: The fraud in the first case was committed by the director, or at least the first steps in it were taken by him, when he was acting officially and on behalf of the bank, and within the scope of his agency for the bank; his undisclosed knowledge of the truth therefore affected the bank, for he possessed his knowledge officially; the fraud in the second case was committed by the director as an individual, when he was acting as agent for A. in a matter in which A. had specially commissioned and intrusted him to act; his knowledge of the truth, therefore, was his private knowledge and not the knowledge of the bank; for he did not possess it officially. In each case the principal in whose business the director was agent for the time being, and within the scope of his agency for whom he committed the fraud, and possessed a knowledge of the truth which he did not disclose, was obliged to suffer the penalty of his breach of his trust and to make good his fraud. The distinction is as correct as it is subtle.

In Loomis *v.* Eagle Bank of Rochester, a bank-director was payee of a note, a part of which the makers claimed the right to recoup by reason of an alleged breach of contract between themselves and the payee. The director transferred and indorsed over the note to the bank for value and in due course of business, but without informing them of the claim of the makers. It was held that the claim could not be sustained as against the bank. The knowledge of him who was at once payee and director was not the knowledge of the bank. He did not come by it or possess it officially. The court remarked that to insist that the private knowledge of any director should bind the bank would work indefinite mischief in business.

In the Washington Bank *v.* Lewis, a director procured the

discount of a note which was afterwards disputed for fraud. The defence was not considered good. But this case is to be distinguished from the case of the Bank of the United States *v.* Davis, for whereas in that case the director had, at least presumably, acted as a director in procuring the loan, in the present case, the court distinctly state that it was because he did *not* act officially in the making of the loan, but simply applied for and obtained it as any other person, wholly an outsider, would and must have done, that the defence cannot be sustained. The two cases differ from each other in precisely the vital point;—in the former the director had knowledge, within the scope of his agency, which, since he acted in the prosecution of his agency, he was bound to communicate, and which was therefore in law the knowledge of the bank; in the latter case the director having, in fact or presumably, the same species of knowledge, explicitly refrained and declined to exercise his agency in the matter, but dealt, as he had a right to do, with the other directors wholly in the character of an outside negotiator and contractor; since he was not acting in his agency it followed, unavoidably, that he owed no duty to the bank, and that his knowledge was private, not corporate, in its character.

Notice to any other Officer than a Director.

In the case of knowledge acquired by or communicated to any other officer than a director, little difficulty can arise. The president, it should be remembered, is a director. But his duty of general supervision is more general than that of any other member of the board. Wherefore notice to him on any subject would probably be held to be notice to the bank.[1] If it fall within the scope of the agency and official employment of the officer it is notice to the bank. But of course the notice in such case must be of a reliable and authentic nature. Rumor, or gossip, or statements proceeding from sources which

[1] Porter *v.* Bank of Rutland, 19 Vt. 410.

might naturally be supposed inaccurate, are neither knowledge nor notice. Hearsay tales and idle talk can be properly disregarded, but information of so credible a nature that no reasonable man would dare to neglect it in his own private affairs, cannot be neglected by a bank officer in the affairs of the bank. Yet if it does not concern a matter which falls within the scope of his real or presumable agency and official employment, apparently he is at liberty to disregard it, and the bank cannot be injuriously affected by his so doing. For the bank having neither made him nor held him out as its agent in these premises is bound by nothing which he does, says, or hears in them. If the cashier knows or learns something concerning a matter exclusively within the functions of the president, his knowledge is not the knowledge of the bank. In the language of the court in the case of the Fulton Bank *v.* New York and Sharon Canal Co.; if the notice be to one who has no duty to perform relative to the subject-matter of the notice, it will not be enough.[1] The words were used in discussing notice to a director, but they state a doctrine of general application. The reason that there is so much more difficulty in deciding when notice to a director is notice to the bank than there is in deciding the same matter in relation to subordinate officers, is simply because the respective functions of the various subordinates are the subject of specific limitation and accurate definition, at least to a much greater extent than the broad general indefinite obligations which rest upon directors. A director is interested in the charge of every matter, and in the conduct of every transaction in or concerning the business, management, and welfare of the bank. In whatever department the knowledge is to be used, he must communicate it if he receives it officially, for he is excluded from responsibility in no department whatsoever. His range not only covers all the region allotted among the subordinate officers combined, but a vast ground besides, being nothing less than the totality

[1] 4 Paige, 127.

of the bank's affairs and interests. What he hears casually in conversation, as he doubtless would if he were not a director, he may regard as unofficially heard, and as not, in a legal point of view, demanding repetition. But if the communication is made to him, because he is a director, or for the purpose of conveying the knowledge to the bank, it is then made to him in his official character, and without regard to the nature of the affairs or business to which it relates he is bound by the duty of his office to use it in the proper manner for the benefit of the bank. That the intention is to render the communication official may be shown by a direct statement to that effect, or it may be an inference from the character of the conversation or the attendant circumstances. The fact that the intention existed, and that it was, or ought to have been, understood by the recipient of the knowledge, is sufficient to fix the official character. This fact, once established, is conclusive in the case of a director. In the case of any other officer it is not conclusive, but must be supplemented by the additional fact that the matter fell within the scope of his real or inferable agency.

The converse of the doctrine just discussed is much more simple. Whatever knowledge a director has or ought to have officially he has, or will be conclusively presumed at law to have, as a private individual. In any transactions with the bank, either on his own separate account or where others are so far jointly interested with him that his knowledge is their knowledge, he and his joint contractors will be affected by this knowledge which he has, or which he ought, if he had duly performed his official duties, to have acquired.[1] Thus a director is affected with notice of the condition and transactions of the bank, of its legal rights, and of the action of its directorial board on any subject. If the bank is insolvent, or if it offers him for purchase notes, which could only be legally sold by authority of a directorial vote which has never been given, he

[1] Lyman v. United States Bank, 12 How. 225; 1 Blatch. C. C. 297.

is affected with knowledge of the insolvency, and of the illegality of the notes. He cannot collect upon them from the bank, on the ground of presumed regularity, as a *bona fide* outside purchaser of them, without notice and for value, could do.[1]

In the discussion of this topic a brief abstract of the case of Curtis *v.* Leavitt should not be omitted.[2] Bank directors authorized the issue of bonds to certain trustees for sale. The officers whose duty it was to make the issue, assigned the bonds to persons other than those named as trustees, and also to an amount in excess of that authorized. Their action in the latter particular, however, was subsequently ratified by the corporation. One of the persons acting as a trustee was also a director. The court declared the assignment valid for the benefit of *bona fide* purchasers of the bonds for value and without notice, and that the knowledge possessed by him who combined the positions of director and trustee, that the assignment was in fact without due authority, did not make the purchasers of bonds under the trust chargeable with a like knowledge. It is clear from the language of the court that if the director and trustee had, in his latter capacity, been the *real* party in interest, instead of only a trustee nominally representing entirely innocent third parties, the decision would have been to the contrary effect. So that this case at once proves the general doctrine, and furnishes a sound and valuable specimen of exception to it.

Liability of Directors for Mismanagement.

If bank directors do not manage the affairs and business of the bank according to the directions of the charter and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders, or creditors, or both.[3] They may be held to account to an injured party in

[1] Gillet *v.* Phillips, 3 Kern. 114. [2] 15 N. Y. 9.

[3] Hodges *v.* New England Screw Co., 1 R. I. 312; 3 id. 9; Bank of St. Mary's

a Court of Chancery,[1] or they, or any one of their number who shared in the wrong-doing, may be sued at law for damages.[2] But for excusable mistakes concerning the law, and for many errors strictly of discretion, they are not liable. Though in cases in which their action has been so grossly ill-advised as to warrant the imputation of fraud, or to show a want of the knowledge absolutely necessary for the performance of their duties, so great that they were not justified in assuming the office, they may be held responsible.[3] They are required simply to show a reasonable capacity for the position they accept; to use in it their best discretion and industry; to show the scrupulous *bona fides* and conscientiousness in every matter, however minute, which is exacted rigorously from all trustees of the property of others; and to obey accurately the requisitions of the charter, or of the general law under which they are organized. For example, if directors declare a dividend at a time when the bank is so far embarrassed that such a needless disbursement of money must be regarded as an act of either fraud or folly, and which could have been advocated by no man who was not dishonest or grossly incapable, they may be held liable for the consequent loss to the corporation.[4]

The act is not to be excused, for it must be either fraudulent or the result of such excessive unfitness as to become the legal equivalent of fraud. Collateral to this right of action for the improper declaration of a dividend, is the right of the shareholder to protection for the future in a Court of Equity. It is one of the very few cases in which he can interfere to control the judgment of the board. If he makes out a proper case he may have an injunction against the directors, prohibiting the

v. St. John, 25 Ala. N. S. 566; Attorney-General *v.* Wilson, 1 Craig. & Ph. 1; 10 L. J. N. S. 53; 4 Jur. 1174.

[1] Hodges *v.* New England Screw Co., *supra;* Bank of St. Mary's *v.* St. John, *supra.*

[2] Conant *v.* Seneca County Bank, 1 Ohio St. 298.

[3] Godbold *v.* Branch Bank, 11 Ala. 191; Smith *v.* Prattville Manufacturing Co, 29 id. N. S. 503.

[4] Gunkle's Appeal, 48 Penn. St. 13.

declaring of other dividends thereafter. The proceeding for this purpose is an independent one, and does not operate as a waiver of his right of action at law to recover damages for the injury sustained from the payment of the dividend already declared. For apparently this act, however wrongful, cannot be undone after the measure has passed the corporate government. The right of each share-holder to receive his dividend is perfect so soon as there has been a formal vote to pay it. It is rendered a debt owing from the bank to him. After this stage it is too late for a Court of Equity to enjoin the disbursement of the dividend, certainly where only one share-holder is before the court.[1]

So again if the charter forbids the issue of bills for circulation before a certain portion of the capital stock has been subscribed and paid in, in specie, an issue before that time will make the directors personally liable to redeem any of the bills which the bank is unable to pay in the due and ordinary course of its business. A statutory requisition of a nature so plain and simple as this cannot be excusably broken. If broken the breach cannot be regarded as a mistake of law.[2] Mistakes as to what is the law, serve to excuse cases where correct knowledge could be reasonably expected only from a professional man, and even in such cases if the directors feel any doubts they may be guilty of neglect if they fail to seek and be guided by competent legal advice. Thus the board of a bank voted to pay a director for services; the court held that he could not be legally paid. But the point was purely legal; the directors had acted honestly and without negligence in the matter, and they were accordingly exculpated from blame or responsibility.[3] But ignorance of any fact in the bank's affairs, which it is their duty to know, can never be set up by them in defence or exculpation for any act which the existence of that fact should have prohibited.[4]

[1] Fawcett v. Laurie, 1 Drew & S. 192. [2] Schley v. Dixon, 24 Geo. 273.
[3] Godbold v. Branch Bank, 11 Ala. 191.
[4] Bank Commissioners v. Bank of Buffalo, 6 Paige, 497.

If liability of a director once accrues for any of the above-described species of malfeasance in office, whether his acts have been the result of dishonesty, negligence, or incompetence, the claim of the bank against him becomes a part of the assets of the institution. An assignee, commissioner, or other party whomsoever, who may come into possession of the corporate property for the purpose of collecting it and distributing it among the creditors and share-holders, is obliged to regard the rights of action against such delinquent directors as a part of the available assets. It is his duty to push the claims; to make what he can out of them and to apply the proceeds together with the other funds of the corporation to the discharge of its indebtedness and the reimbursement of its creditors and share-holders. The suit may be instituted in the corporate name, provided it is stated that it was instituted by order of the receiver.[1] The liability is at common law, and though a statute or charter may declare what acts of a director, committed under what circumstances, shall render him liable, yet these enactments will not operate to alter the nature of the liability, once accrued, or to render it statutory. They must be construed as simply relating to evidence, and as declaring that testimony establishing the acts and circumstances described, shall suffice to fix the liability; which, however, after it has been thus fixed, will still retain its original and inherent common-law character. For this same reason dexterous and subtle evasions of the language of the statute will not enable the directors to frustrate its intent, or to shun a responsibility which is fastened upon them by extrinsic principles of law, wholly without the statute or the charter, and existing quite independently of either. Thus if the statute declares that in case an insolvent or embarrassed bank shall be "*compelled*" to make an assignment, then the assignee shall pursue his rights of action against the directors, and their liability shall be maintained upon proof of certain facts in their conduct, the

[1] Bank of Niagara *v.* Johnson, 8 Wend. 645.

directors cannot escape either the obvious purport of this legislation, or their common-law liability, by making a voluntary assignment before they have been actually "compelled" to do so.[1] But whatever liability may have been incurred by all or any of the members of a board of direction, it will not descend to their successors in office, who are blameless upon their own account. Neither will it pass to any third party to whom they have assigned corporate property, if he took it in good faith, without collusion, and for value.[2]

It has been declared in a Georgia case that with the expiration of the charter of the bank, the liability of the directors for over-issues ceased also.[3] One judge dissented from this opinion, and it must be confessed that it is difficult to believe that it is sound law. An over-issue of circulating bills is a very grave offence. It can hardly be done honestly, and even if it is, the gross neglect of duty, which must open the door to it, deserves a scarcely lighter responsibility than actual fraud. But if there is to be any limitation to a liability thus created surely it cannot accrue until such time as no person on behalf of the institution has the duty of redeeming its notes, so that those still remaining out may properly be supposed by the community to be utterly worthless. Statutory or charter provisions, or judicial decrees, often place this time at a date much later than that of the technical expiration of the charter. So long as the community have a right to look to any one to redeem the bills of the bank, surely they should have the right to look to a director who has taken part in an over-issue.

False Statements of the Condition of the Bank.

It often happens that the officers of corporations put forth deceptive and fraudulent reports, and make false statements concerning its affairs, in order to keep up its good repute with the public and to sustain or raise the price of shares by attract-

[1] Gunkle's Appeal, 48 Penn. St. 13; Schley *v.* Dixon, 24 Geo. 273.

[2] Schley *v.* Dixon, *supra*.

[3] Moultrie *v.* Hoge, 21 Geo. 513.

ing purchasers. As our banking corporations are conducted at present under the National Banking Act, deception cannot be easily effected by such artifices. Indeed misconduct of this kind seems to have always been rare in the banking institutions of our own country, and most of the cases are English. The bank in its corporate capacity can never be held to answer for any species of fraud or deception of this nature practised by any of its directors or other officers, individually, though at the banking-house and in banking hours. No single director, neither any other official, has it within the scope of his customary authority to bind the bank by any representations whatsoever made concerning its condition or affairs. The bank does not hold them out as competent to give information of this character, and any person who relies on statements thus received puts his confidence in the individual from whom the statements proceed, and though he may have a good cause of action against him, it is against him as a private individual and not as an officer of the bank, and can by no means be against the bank itself. The bank itself can only be held liable if it publishes corporate reports, as such, falsely and with the criminal intent. Such would be a statement adopted at a general meeting of the directors and intentionally put forth to the public, or left to reach the community in the ordinary course of business. Where the directors have been assisted in the preparation of their deceptive or fictitious statements by any subordinate officers, these officers will be under the same personal liability as the individual directors, though the directors alone have signed the document.[1] The tendency in England seems to be generally to hold the directors liable if possible, and statutory enactments come to the aid of this tendency with thorough provisions and stringent punishments. Thus directors, and any officer in collusion with them are liable to

[1] Cullen *v.* Thompson, 4 Macq. H. L. Ca. 481; 9 Jur. N. S. 85; *Ex parte* Frowde, 9 W. R. 828; 8 L. T. N. S. 848; *Re* Royal British Bank; *Ex parte* Nichols; 5 Jur. N. S. 205; 28 L. J. N. S. 257.

indictment for conspiracy to defraud by the publication of false balance sheets and the circulation of false reports as to the condition and solvency of the bank; or the issuing and offering for sale new stock, at a time when they knew the bank to be insolvent.[1] So again they were held criminally responsible for representing the affairs of the company to be prosperous and declaring large dividends when in fact the bank was embarrassed.[2]

In a New York case[3] one count alleged that a falsehood concerning the amount of stock actually subscribed and paid in had been uttered by the defendant, as director, together with the other directors, in the articles of association, whereby the plaintiff had been induced to purchase shares. The court said it was difficult to understand how a director could be individually chargeable for false statements in the articles of association, which necessarily preceded in order of time the election of directors; or how such articles could have the character of a continuing false representation by every director who might subsequently come into the board, so as to give a right of action against him to every one thereafter purchasing stock. The second count alleged that the defendant falsely and fraudulently represented to the plaintiff that the shares were actually worth par or over, whereby the plaintiff was induced to purchase. This count, in order to be sustained, was required to make out a good cause of action against the defendant in his individual capacity. As director he could not be charged with knowledge of the value of the stock. But at any rate the pleading was fatally defective in failing to allege that the misrepresentations were made with the intent to deceive the plaintiff. The whole statement of the count might be true and yet this intent might have been absent; and the allegation and proof of the intent are a *sine qua non* to a recovery. The prin-

[1] Regina *v.* Esdaile, 1 F. & F. 218; Grant on Bankers and Banking, p. 543, and cases cited.

[2] Burnes *v.* Pennell, 2 H. L. C. 497. [3] Mabey *v.* Adams, 3 Bosw. 346.

ciples laid down in this decision are unquestionably correct. Yet as the professional man studies the case he will be obliged to regret either that it was so wofully misunderstood or mismanaged by the plaintiff's counsel or that it was so clumsily reported. One or the other of these misfortunes has robbed it of much of its value as an authority. At the same time it must be confessed that there is a great dearth of precedent in this department, and advice or the conduct of a case can be governed only by general principles.

A very common provision in banking acts and bank charters names a certain sum or ratio which the indebtedness of the bank shall never be allowed to exceed, and for any excess makes the directors, under whose administration it was allowed, liable. Apparently directors have a salutary fear of exposing themselves to the risks of this enactment, for few suits are reported in the books. Neither are the few which are found very valuable authorities. The chief lesson that they teach is the necessity of a minute accuracy of detail in any legislation which may be undertaken for the accomplishment of an end, like this, of personal responsibility in an unremunerative employment. They are not very consistent *inter se*, nor do they easily arrange themselves under any distinct principle. In Neal *v.* Moultrie[1] it was declared that the liability, being statutory, was not barred for twenty years; and that the limitations which might run against a fine, a forfeiture, or a penalty had no force in this matter. Hargroves *v.* Chambers[2] decided that in a suit against surviving directors, on the ground that all the directors had become individually liable, it was not necessary to join the representatives of deceased directors; also that certificates of deposit payable on order with interest from date formed a part of the corporate indebtedness; also that neither waste of the assets of the bank in the hands of the assignee, nor a judgment of forfeiture of franchise pronounced against the bank, nor the expiration of the bank charter, could operate

[1] 12 Geo. 104. [2] 30 id. 580.

to relieve the directors from their liability. It was added as a *semble* that they would not be relieved by these events even if the dissolution of the corporation discharged its indebtedness. Next we have the case of Banks *v.* Darden,[1] also decided in Georgia, but hardly destined to add much to the reputation of the learned bench of that State. The charter of the bank fixed the limit of indebtedness and provided that "in case of excess the directors . . . shall be liable for the same in their private and individual capacity." The court held that the provision was remedial and not penal; that the liability of the directors was joint and not several; and that no single member of the board could escape his responsibility by proving either his absence from the meetings at which the excess was suffered to be incurred, or his dissent from the action of his co-directors. In discussing the last point the judge waxes eloquent and picturesque in his language. He imagines a director not only absolutely innocent of collusion in the wrong-doing, but even laboring strenuously though in vain to obtain respect and obedience for the law. But, he says, even for this ill-starred individual there is no flight from the rigid vengeance of the statute. It is indeed "a bloody legal picture," yet the law is inexorable; the "pound of flesh must be had." In Michigan the judges were less Draconic in their interpretation of their similar legislation, and ventured to hold that a director was not liable for an excess created by a loan, to the making of which he had objected at the time when it was agreed upon by the board.[2] In Ohio the law-givers wisely took this matter into their own hands, and laid down specifically by what means, such as publication of his dissent and the like, a director might save himself from liability for any action of the remainder of the board. The opinion in this case was the result of a very careful consideration of the subject, and deserves to be noticed. The statute provided that for any excess the "directors, under whose administration it should happen, should be liable for the

[1] 18 Geo. 318. [2] White *v.* How, 3 McLean, 111.

same in their natural and individual capacity in an action of debt against them or any of them." The court held that the remedy of the creditors was a penal action and not one of contract; and that the measure of damages would be the amount of the excess of liability created by the board of which the defendant or defendants were members. The grounds on which this conclusion were based were as follows: 1. The language of the act does not declare that the directors shall be personally liable on the contract itself of indebtedness, which was created in excess of the legal limit, but solely for the excess itself. 2. The liability does not run to the persons holding the particular contract made in excess of the limit, but to the creditors generally; wherefore, the ground of action is clearly not the original contract. 3. The amount which any creditor can recover is not the amount of his own debt, but the amount of the excess of the total liability beyond the legal limit; and this even though his own debt forms no part of the excess. 4. The liability is provided for in the manner customary in penal statutes to vindicate a violation of law. 5. The action provided is the usual action prescribed by penal statutes to recover a penalty. 6. The action of the creditor must be debt, whether his contract with the bank be such as to authorize this form or not. The court then add that they consider that the right to bring this penal action is given to any one among the creditors who may choose singly to institute it, but for the benefit of the whole body of creditors, and to create a fund for the indemnity of all.[1] These last remarks leave hanging a good many loose ends provocative of inquiry, and not easy to answer. Thus after one creditor has instituted a suit, is every other creditor debarred from bringing one? For if so, then a creditor in collusion with the directors may institute a suit for the express purpose of protecting them. Yet on the other hand it is clear that each creditor cannot be allowed to push his suit to the point of actual recovery, for it is not contem-

[1] Sturges v. Burton, 8 Ohio St. 215.

plated that the directors shall do more than simply refund the amount of the excess once for all, for the indemnification of all the creditors. If there is to be a race and he who first gets judgment shall first have execution, how are the costs of the other cases to be decided? Can other creditors come in and join as parties in the suit instituted by one alone, or shall he, being first in the field, have the whole management and discretion concerning the choice of counsel and the conduct of the cause? Above all when one creditor has actually taken out his execution against the directors for the amount of their liability what method can be pursued for insuring the application of the sum he may collect thereon to the reimbursement of the other creditors. If he misapplies it through ignorance or fraud, or if it should be attached by his own creditors, so that the contemplated reimbursement should finally fail to take place, could the directors be sued again by another creditor?

It may be thought that neither these cases nor the criticisms they have called forth have been worth the trouble of repetition here. Certainly they are totally destitute of that positive value which belongs to a well-reasoned judicial opinion delivered by a bench of repute in a thoroughly-argued case. But they have some negative value, and may serve to aid correct discussion, or to guide wise legislation, by showing the folly and insufficiency of much which has been hitherto attempted. They are eminently suggestive.

Pay of Directors for Services.

Ordinarily the position of director, whether in a bank or any other corporation, is not one entitling the incumbent to demand compensation for his services. Usage is so uniformly to the effect that the services are rendered gratuitously, that an especial contract or vote could alone enable a director to demand pay as a legal right. Nor could even a formal vote confer upon him this right if it were not passed until after the rendition of the services. For it would then become invalid

on the ground of want of consideration.[1] So it has been held that a director, who was receiving no compensation, could not recover from the bank a reward offered by it for the recovery of money stolen and the detection of the thief. For it was only a part of the legal duty imposed by his office to give all the information upon these points which he might succeed in acquiring. But the principle applies only to the services performed by directors in the execution of their directorial functions. For services rendered prior to their becoming directors they may properly be paid. So also for services in any special duty or agency wholly outside of the ordinary duty or agency of a director they are entitled to pay upon the principle of *quantum meruit*.[2] If a peculiar and especial task is undertaken by a director at the request of the board, which he is under no obligation to undertake simply because he is a director, and which he could not reasonably be expected or required to undertake gratuitously after the fashion of his ordinary directorial functions, neither justice nor any judicial decisions oppose his receiving or requiring just compensation for the labor.[3] But in Alabama, where pay was allowed to directors of the State Bank, and the amount was fixed by law, it was declared that no additional pay could be allowed for extra services rendered during incumbency in the office.[4] The fact that regular pay was given takes this case out of the operation of the general rule. It was probably considered that the pay was intended to buy all such services as the directors should undertake or be able or called upon to render, whether strictly within their ordinary duties or not. If the duty was unusual, so also was the receipt of any salary at all at least equally so.

[1] Hall *v.* Vermont & Massachusetts R.R. Co., 28 Vt. 401; Pierson *v.* Thompson, 1 Edw. Ch'y, 212; Loan Association *v.* Stonemetz, 29 Penn. St. 534; Dunston *v.* Imperial Gas Co., 3 B. & Ad. 125.

[2] Stacy *v.* State Bank, 4 Scamm. 91.

[3] Branch Bank *v.* Collins, 7 Ala. 95; Chandler *v.* Monmouth Bank, 1 Green, 255.

[4] Branch Bank at Mobile *v.* Collins, *supra*; Branch Bank *v.* Scott, id. 107.

Records.

Records of the proceedings of the board of directors are good at law, although not taken at the time of the meeting. They may be made at any time subsequently and relate back.[1]

PRESIDENT.

Of his Powers and Duties Generally.

The president of the bank is usually, perhaps universally, a member of the board of directors, and is customarily chosen by the board from their own number. Sections 8 and 9 of our National Banking Act prescribe this method for all banks organized under it. It is the duty of the president to preside at meetings of the board of directors. The amount and nature of the duties imposed upon him may vary in different associations according to the usages or the by-laws of each. But ordinarily the position is one of dignity and of an indefinite general responsibility rather than of any great and accurately known power. The president is usually expected to exercise a more constant, immediate, and personal supervision over the daily affairs of the bank than is required from any other director. Usage or directorial votes may confer upon him special functions, and may extend his authority to correspond with the increase of active duties. But the authority inherent in the office itself is very small; indeed it is very difficult to say precisely how or wherein it is really much in excess of that which can be exercised by any other single director. Practically this legal principle is not known or not distinctly recognized in very many banks, and frequently presidents undertake to exercise a very considerable control in the daily routine of business. When this is done with the knowledge and approbation, or the tacit sanction of the board of directors, it may be regarded as legalized by the principles of ratification or

[1] Commercial Bank v. Bonner, 18 Sm. & M. 649.

usage. Yet these afford an indefinite and dangerous basis on which to rest important dealings. A careful collation of all the adjudicated cases, it must be confessed, wears a striking and peculiar aspect, which is not very favorable to the assumption of any species of executive power by a bank president without direct authorization. With scarcely an exception all the decisions are to the effect that the president had no right to perform some particular act, which he had undertaken probably in perfectly good faith to perform, and which had been called in question, and had given rise to the litigation in which it was condemned. So the reader will notice that in discussing this topic we are obliged, in order to keep within the bounds of established law, to confine ourselves almost wholly to declaring what a president can *not* do.

Indeed it is a singular fact that the entire collection of judicial authorities justifies the enunciation of only one act as falling within the properly inherent power of the president. This solitary function is to take charge of the litigation of the bank. There is no question but that this matter belongs to him by virtue of his office. He may institute and carry on legal proceedings to collect demands or claims of the bank. He may appear, answer, and defend in suits against the bank. He may retain and employ counsel on behalf of the bank. Counsel requested by him to act for the bank will bind it by their action in the case, within the ordinary powers of counsel, by sole authority of their engagement by him. And it will make no difference, though circumstances make that engagement originally wrong or improper.[1] This would be his own breach of trust towards the bank, committed within the scope of his authority, damages for which the bank could only recover from himself, and which could affect no innocent outside par-

[1] Savings Bank of Cincinnati *v.* Benton, 2 Metc. (Ky.) 240; American Ins. Co. *v.* Oakley, 9 Paige, 496; Mumford *v.* Hawkins, 5 Den. 355; Oakley *v.* Workingmen's Benevolent Society, 2 Hilt. 487; Alexandria Canal Co. *v.* Swann, 5 How. 83.

ties, whether these should be the counsel employed or the other litigants in the cause.

Where one transacts business or enters into contracts or agreements with the president of the bank, which in form run between the person upon the one part and the president, described as such, upon the other, if it was understood by the party at the time that he was in fact dealing or agreeing with the bank, if he acted upon this supposition in good faith, if the president had from any source authority to bind the bank in such a transaction, and especially if the bank actually receives whatever benefit may accrue from it, then it cannot be doubted that the bank could be held to perform whatever was undertaken on its behalf by its president.[1] But if the president was acting beyond the scope of any authority derived from his office, from directorial votes or from usage, then his act, except of course by virtue of a subsequent ratification, could not bind the bank. Even where the president does not designate himself as such, yet the circumstances of the transaction may be put in evidence, to show, so far as they may be able, that he was in fact acting in his official capacity; and if this be established, the failure to designate himself formally by his official title will not affect the binding force of the transaction upon the bank. But if the dealing was with him as an individual, not as an officer, the bank has nothing to do with the affair. Thus where one gave money to a bank president, who signed a receipt for it "to be deposited in the bank to the credit of A." and signed the receipt simply with his name alone, it was held that the facts were admissible to go to the jury for what they might be worth as tending to show that the money was paid to and received by the president in his official capacity on behalf of the bank; but that they were by no means conclusive of this, and that if the jury should find that the money was intrusted to the president as a private individual simply for the convenience of getting him to deposit it on behalf

[1] Tremont Bank v. Paine, 28 Vt. 24.

of A., then he was A.'s agent, and if he failed to make the deposit regularly and honestly, it was his individual, not his official, default, and the bank was not liable.[1] Precisely to the same effect was the decision in Terrell *v.* Branch Bank;[2] though the officer receiving the money was in that case a director, the principle of law is identical in the two rulings.

In New York, special statutes have allowed many matters to be conducted in the president's name. Thus the bank may sue and be sued in the name of its president, provided the cause of action is distinctly laid to be for or against the corporation, and not for or against him.[3] Mortgages to secure subscriptions for stock properly run to him. And it has been accordingly held that the assignment of such mortgages should be executed by him, personally, in his own name, with the addition of his official designation, and under his private seal, rather than under the corporate seal.[4] A transfer made to "D. L., President of the American Exchange Bank," was construed to be, by fair interpretation, a transfer directly to the bank;[5] with the same effect of vesting title as if it had been made to the bank itself by its corporate name. In support of this case the statutes of the State were referred to. But the reference seems needless, for the decision could well have rested solely upon the general principles enunciated. These perhaps afford some support to the doctrine advanced in the last preceding paragraph, and certainly make the cited case useful as a general precedent, without regard to the effect of local legislation.

1 Sterling *v.* Marietta & Susquehanna Trading Co., 11 Serg. & R. 179.

2 12 Ala. 502.

3 Delafield *v.* Kinney, 24 Wend. 345; Ogdensburgh Bank *v.* Van Rensselaer, 6 Hill, 240; Pentz *v.* Sackett, Hill & D. 118. See also Hunt *v.* Van Alstyne, 25 Wen 605.

4 Valk *v.* Crandall, 1 Sandf. Ch'y, 179.

5 Leavitt *v.* Fisher, 4 Duer, 1.

President's Control over Property of the Bank.

The control of the president of a bank over its property of any description whatsoever from real estate down to a naked right to bring an action at law, is of the slightest. He has no power to draw checks in its behalf, or against its funds. He is not the executive officer who has charge of its moneyed operations. It is not among his functions to withdraw or remove its deposited funds, or to use them for any purpose whatsoever. He cannot even employ any portion of the assets or credits of the bank to paying or settling with its creditors, unless by virtue of an express delegation of authority from the directors. He has no more power of management or disposal over the property of the corporation than any other single member of the board.[1] But of course if any resolution or any established usage gives him the power either at all times or under special circumstances, to draw against the corporate deposits, he may do so within the limits of the power. Thus in the Tennessee case cited, an usage was shown for the president to draw checks when the cashier was absent, and the judges went the length of holding that he might legally do so, in the absence of the regular cashier, even though a cashier *pro tem.* had been chosen.[2]

When the general management of the affairs of the bank is left, as is customary, with the directors, the president has not power to mortgage, assign, or pledge any more than he has otherwise to dispose of any of its property of any description whatsoever, or for any purpose, however proper and justifiable in itself.[3] In the case in Selden's Reports the court say: "In Massachusetts it has been held that neither the president nor

[1] Gibson *v.* Goldthwaite, 7 Ala. 281.

[2] Neiffer *v.* Bank of Knoxville, 1 Head, 162; Fulton Bank *v.* New York and Sharon Canal Co., 4 Paige, 127. But as to when bank is justified in paying on signature of president, see chapter on checks.

[3] Hoyt *v.* Thompson, 1 Seld. 320; Leggett *v.* New Jersey Manufacturing and Banking Co., Saxt. Ch'y, 542.

the cashier has power *virtute officii*, to transfer negotiable funds, without express authority from the directors. This however must be erroneous, if the transfer be made in the usual course of business, and *bona fide*. But it is safe to say that when the sale, assignment, or transfer requires the use of the corporate seal, it cannot be made without the assent and authority of the board." However reluctant we may be to confess that the learned judge correctly interpreted the opinion of the Massachusetts court, it cannot be denied that his correction thereof and the doctrine laid down by him are correct. But this is by no means necessarily to be construed as extending the power of the president to the performance of any of the acts specified. The judge says only that the president *or* cashier must be able to do them, and certainly the cashier is able to do them. Equally certainly there is no authority whatsoever for supposing that the intention was to declare the president also able to do them.

The same species of limitation in the power of the president forbids him to surrender or release claims of the bank against any person, from whatsoever source arising; or to stay the collection of an execution against the estate of a judgment-debtor. For either of these acts is the exercise of a discretionary authority over the affairs and property of the bank which is the peculiar and exclusive province of all the directors.[1]

The president, unless specially empowered, cannot enter into contracts or agreements on behalf of the corporation. Authority so to do may however be conferred on him by the charter, by vote of the board of directors, or by the existence of such facts as constitute a public holding out, and warrant the public in believing that the undertaking is within the scope of his legitimate delegated authority.[2] But a charter provision, or a directorial vote conferring a power upon the "President *and*

[1] Olney v. Chadsey, 7 R. I. 224; Brouwer v. Appleby, 1 Sandf. 158; Spyker v. Spence, 8 Ala. 333.

[2] Mt. Sterling Turnpike Co. v. Looney, 1 Metc. (Ky.) 550; Farmers' Bank v. McKee, 2 Penn. St. 318.

directors," or the "president *and* cashier" will be strictly construed as conferring only a joint power, exclusively, and by no means a joint and several power. The execution can be by neither of the designated parties singly, but must always be strictly by both in conjunction.[1] Though if both agree that a certain course shall be pursued and that an executive act occurring therein shall be done by one alone, that act may be legally performed according to such arrangement. This is mere matter of detail, and pertains to the execution, not to the exercise, of the power. For example, where their power is to borrow money, if they agree upon all the items going to make up the transaction, but that the note given for the loan shall be indorsed by the cashier alone, this will be a perfectly regular and sufficient execution of the duty intrusted to them.[2]

Such is the general doctrine, forbidding any species of contract to be made by a president on behalf of his bank. But in some few cases, such as will occasionally arise, in which the special contract could be condemned as invalid without the necessity of making the prohibition against contracting at all quite so sweeping and absolute, the courts have contented themselves with holding that a president cannot bind the bank in any unusual manner or in any undertaking lying outside of its customary routine of business. Upon this narrower ground have been based rulings: (1) That a bank president has no right to agree to receive deposits of money on interest, it not being a part of the ordinary business of banking to do so.[3] (2) That the president cannot charge the bank with any greater liability for the safety of a special deposit than the bank is wont to undertake for such.[4] To the same principle may be also referred the ruling that the promise of the president and cashier, that an indorser shall not be liable on his indorsement, does not bind the bank, though it may be so specific as to bind

[1] Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256; Macbean *v.* Irvine, 4 Bibb, 17.

[2] Fleckner *v.* Bank of United States, 8 Wheat. 384.

[3] Fulton Bank *v.* New York & Sharon Canal Co. 4 Paige, 127.

[4] Foster *v.* Essex Bank, 17 Mass. 479.

the president and cashier as individuals. An agreement so contrary to the usual course of business and to the probable interest of the corporation can be made by no less an authority than that of the directors.

Admissions of the President.

Admissions of the president affect the bank only when they relate to matters within the scope of his agency.[1] The fact of his high and responsible position does not operate to extend in any degree the rigidity of this rule of the common law.

Personal Undertakings for the Corporate Benefit.

If the notes of the corporation are protested for non-payment, and are thereafter paid by the president individually from his own private funds, for the honor of the bank, the whole transaction having been conducted throughout in strict good faith, the president becomes thereby a creditor of the bank for the amount so paid by him, and may prove the claim against the bank in insolvency.[2] But if the president guarantees or indorses the promissory notes of the bank, he will be presumed to do it gratuitously and from the disinterested motive of promoting the welfare of the institution over which he presides. He will not be allowed to maintain any claim by reason of his so doing, except upon proof of an explicit contract entered into by himself with the government of the corporation.[3]

Payment of the President.

With regard to whether or not a president is entitled to payment for his services, no absolute and unvarying rule can be laid down. No implied promise to pay him, any more than to pay any other director, is raised by his appointment to the

[1] Spalding *v.* Bank of Susquehanna County, 9 Barr, 28. See remarks on Declarations and Admissions of Cashiers, *post.*

[2] Bank Commissioners *v.* St. Lawrence Bank, 8 Barb. 436; 3 Seld. 185.

[3] Leavitt *v.* Beers, Hill & D. 221.

office. On the contrary it has been said that the presumption is that he is not to be paid. But frequently a bank requires so much of the time of its president to be devoted to its interests and affairs that it in a great measure precludes or materially interferes with his prosecution of other and private business. In such cases it is customary to pay him a salary, as a cashier or any other officer who devotes his time to the service of the bank is paid. Ordinarily the matter of his compensation, in such cases, is left to be arranged by the board of directors,[1] and whatever they vote to pay him he has an unquestionable title to recover. But if they take no definite action in the premises, his right to demand pay will depend upon the nature of the services rendered by him and upon all the circumstances attendant upon his acceptance and incumbency. If these suffice to show that he had a right to expect that he was to be paid, and that the bank, or board of directors, ought to have so understood and ought to have expected to pay him, then he may recover what would have been a fair salary for the position. The presumption that payment is to be made arises where the work or employment is usually the subject of pay. But it does not attach simply because the work is valuable, and therefore *might* properly be given in exchange for money. The custom or usage to pay for such work must be existent and established like any other custom or usage, so that it cannot but be presumed that the parties respectively conferred and accepted the office and functions of president in view of this custom and usage and with the expectation of conforming to it. But informal statements, or remarks made by the president to various individuals, members of the board of directors, to the effect that he shall expect or require pay, have no bearing upon his rights whatsoever; especially where no definite reply appears to have been elicited.[2] If the bank charter distinctly provides that the

[1] Holland *v.* Lewiston Falls Bank, 52 Me. 564.

[2] Sawyer *v.* Pawners' Bank, 6 Allen, 207; Olney *v.* Chadsey, 7 R. I. 224; Hargroves *v.* Chambers, 30 Geo. 580.

president shall have no pay unless it be voted to him by the directors, any service which he may perform for the bank will be presumed to be done by him as president, and will give him no extraordinary right to pay, unless from its nature or from evidence adduced, it is shown beyond a reasonable doubt that the act was really rendered outside of the duties appurtenant to the official position.[1]

CASHIER.

In the discussion of the powers and duties of cashiers we enter upon the most difficult portion of our labors. In no other branch of banking-law are the usages of business so frequently at variance with the rules of law, so powerful in warping and altering those rules, so various among themselves in different places and different institutions and at different times. In no other branch of banking-law is it so difficult to reconcile the decisions and opinions uttered from numerous independent judicial tribunals, or to educe from them generalizations, principles, and rules in any satisfactory shape.

The key-note to the whole subject lies in this: that the office of the cashier is *strictly executive.* He is the business officer of the bank, but in the sense of one who *transacts* the business, not of one who regulates and controls it. The grand difficulty which has been experienced in defining his exact functions has always lain in the necessity of giving him sufficient practical power to enable him to conduct the daily routine of business without trespassing upon the domain of discretionary authority which pertains exclusively and for the most part inalienably to the directors. Acts which demand only confidence in the integrity of the official, and familiarity with the forms and customs of business, acts strictly of *performance*, which do not rise to the importance of the semi-judicial character, are those which he is properly delegated to do. But the responsible con-

[1] Olney *v.* Chadsey, *ubi supra.*

duct and management of the affairs of the institution, upon the soundness and wisdom of which its prosperity and success depend, which call for the exercise of a high degree of care, knowledge, and experience, and a semi-judicial discretion, which demand general business qualifications of a high order, are not, and never have been held to be, appurtenant to the office of cashier. If the bank is ruined and the property of share-holders or depositors is dissipated by the incompetent conduct of its affairs, the directors may, if the mismanagement has been sufficiently gross, be held to reimburse the losses; but the cashier can never be so held unless his own malfeasance in his office or fraudulent collusion with the mismanaging directors makes an extraordinary cause of action against him. He owes this immunity to the fact that he has never had the right to decide, and is supposed never to have undertaken to decide, any question of business-management. He is properly the executive agent of the directors. It is his duty to carry out what they devise. They are responsible for the soundness of the action resolved upon; he is responsible for the honesty, accuracy, regularity, and skill with which that action is carried out. They are the mind and he is the hands of the corporation. They may decide to make a certain loan or discount, to sell or mortgage corporate property. He will pay over the money, take the borrower's promissory note, and see that it is in proper form; he may, by direction of the board, affix the corporate signature and seal, and make delivery on behalf of the corporation, of all instruments necessary to complete the conveyance or the mortgage. It is not wholly unapt to liken the board of directors to a bench of judges, and the cashier to the clerk of court. The same limitation against discretionary action applies to each. The same presumption that any act, not in itself illegal, is done by due authority from the judicial or directorial power, protects the public in dealing with each.

There are certain functions which it is the duty of a cashier to perform, and certain acts which he has the right to do on

behalf of the bank, simply by virtue of his induction into the office. They are inherent in it, and taken together they constitute the component parts which go to make it up. Others may be added, but these are essential. Publicly to call a person by the title of cashier is to invest him with the power, as towards the public, of binding the bank by his action in pursuance or fulfilment of any of these powers and duties. It is in fact a declaration of his agency. If the bank nominates and holds out A. B. as its "cashier," it in effect says to the world that A. B. is duly authorized to transact on its behalf all business which judicial decisions or banking usages have rendered inherent functions of the office designated by this name. It would seem almost a work of supererogation to make this statement, but we have been led to do so by noticing in the argument made lately by very eminent counsel in a very important case, that where the bank charter or the general banking act under which the corporation was established gave to the directors the power to define or limit or prescribe the powers and duties of the cashier, their neglect so to do left the cashier without either powers or duties. The position is novel, perhaps ingenious, but certainly utterly untenable. The conference upon any person of the name and official position of cashier carries with it by a necessary and a strictly legal implication certain duties and certain powers, towards both the bank and the public, of the nature above described. Again and again has this fact been recognized in judicial decisions equally where the directors were, and where they were not, endowed by the law originating the corporate being with powers to define or prescribe the powers and duties of the officers; equally where they had and where they had not undertaken to exercise this privilege. These are the common-law functions, ordinarily appurtenant to the office itself. They in no case require to have their existence affirmatively established; but on the other hand demand strong negative testimony to controvert the legal assumption of their universal force. The great bulk of the

cases which will be cited in illustration of the present topic proceed upon the tacit recognition of this doctrine; but in the foot-note are given a few of those wherein the language more distinctly asserts it.[1] In the case of the United States *v.* The City Bank of Columbus, Mr. Justice Wayne said, that "Though the directors had power under the act of incorporation to fix the duties of the cashier, and though whether they had done so or not did not appear," yet "the acts of the cashier done in the ordinary course of the business actually confided to *such an officer*, may well-be deemed *prima facie* evidence that they fell within the scope of his duty." As a matter of fact, directors seem seldom to have cared to draw up general regulations for the government of their cashiers, and when they have done so their regulations have been so general in phraseology, or have so accurately followed the principles which the law itself lays down in the absence of such directorial action, that they appear seldom, if ever, to have affected the decision in any reported cause. That the power given to directors to define, &c., the powers and duties of a cashier, does not enable them to deprive him of ordinary powers which by virtue either of judicial decisions or of banking usages the public are entitled to regard as inherent in his office, or at least that their action to this effect would not be binding as towards any third party who had not been expressly notified of it, is a principle which has been discussed in a general form,[2] earlier in this chapter, and which needs no special elucidation with respect to cashiers as a class, in distinction from other officers.

The question whether any particular act does or does not

[1] Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46; Wild *v.* Bank of Passamaquoddy, 3 Mason, 505; Bank of Pennsylvania *v.* Reed, 1 Watts & S. 101; Baldwin *v.* Bank of Newbury, 1 Wall. 234; United States *v.* City Bank of Columbus, 21 How. 356; Badger *v.* Bank of Cumberland, 26 Me. 428. The list could be indefinitely extended, if it were worth while.

[2] Also see, especially, Bank of Vergennes *v.* Warren, 7 Hill, 91; Commercial Bank of Buffalo *v.* Kortright, 22 Wend. 348; Sturges *v.* Bank of Circleville, 11 Ohio St. 153.

fall within the general power of a cashier is a question of law for the court and not of fact for the jury.[1] The services of a jury may indeed be called in when it is claimed that acts or conduct of the board have amounted to a public holding out, or that a banking usage relative to the subject of dispute exists. But after the jury has found upon these matters, it still remains for the court to declare whether or not the usage is one which accords with and will be sanctioned by law; and whether the holding out was within the possible legal scope of a cashier's authority.

Principles already laid down in other connections enable us to divide the various acts, which cashiers may undertake to perform, into three entirely distinct classes, to wit: *First*, those acts which constitute the ordinary and common-law functions of cashiers; these any person dealing with the bank is warranted in believing that the cashier is duly authorized to do, and may hold the bank upon them as if the cashier was so authorized, however the real truth may be, save only in cases where his want of authority is affirmatively proved and actual knowledge of this fact is brought home to the third party. *Second*, those acts which the cashier has no inherent power to perform simply by virtue of his office, but which are of such a nature that after their performance has been decided upon they would naturally and properly be executed through and by him; a third party dealing with the cashier in any of these transactions has the advantage of a presumption of law in favor of the legality of his official conduct; his exercise of the power is *prima facie* evidence of his possession of it; but the bank will frequently be allowed to rebut this presumption and conquer the *prima facie* case by showing that as a matter of fact the cashier had never been clothed with the power he assumed; so in such matters if the third party neglects to assure himself of the actual delegation of authority to the

[1] Farmers' & Mechanics' Bank *v.* Troy City Bank, 1 Dougl. 457; Peninsular Bank *v.* Hanmer, 14 Mich. 208

cashier, he deals at his own peril, having in his favor a primary presumption, it is true, but a presumption of which the bank may be permitted to disprove the truth, and thereby to relieve itself from all responsibility in the premises. *Third*, those acts which the cashier may undertake to perform in perfectly good faith, and perhaps under color of authority, but which the law imperatively and absolutely precludes him from performing; such are the discretionary and semi-judicial acts which it is the exclusive province and inalienable duty of the directors to perform at their board-meetings, power to do which on their behalf they can delegate to no other officer whomsoever. No excuse of circumstances is admissible to give to these acts any validity or binding force upon the bank. However honest and ignorant of the illegality both parties to the transaction may have really been, yet neither can be heard to deny his knowledge of the law.

The Cashier's Subordinates.

The cashier is the chief executive financial officer of the bank. Its money transactions, of every description, though they may not be determined by his discretion, will yet be conducted by and through him.[1] He has charge of all its property, its money, its securities, its valuable papers.[2] He has the superintendence of its books of accounts.[3] Of course even in a small corporation it will be impossible for him to do all the business included in these general functions in his own proper person. He must have his subordinates, whose offices will be offshoots of his own. But he will not be liable for the default of any of these subordinates unless his own laches or collusion has caused or aided it. The paying and receiving

[1] Baldwin *v.* Bank of Newbury, 1 Wall. 234; United States *v.* City Bank of Columbus, 21 How. 356.

[2] Wild *v.* Bank of Passamaquoddy, 3 Mason, 505; Franklin Bank *v.* Steward, 37 Me. 519.

[3] Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Baldwin *v.* Bank of Newbury, *ubi supra.*

tellers are in fact only officers detailed to take charge, each of a special duty, falling within the general range of the cashier's position.[1] A paying teller can only pay out money and a receiving teller can only receive it, on behalf of the bank. But though there be an incumbent acting in each of these offices, there is judicial authority for saying that the cashier by his general and higher power may at any time make or receive a payment on behalf of the bank. Perhaps on any particular occasion his doing so might be such a foolish interference in a business of which he did not know all the details from hour to hour, that he could be liable to the bank for negligence or an improper performance, if he paid out money when he ought not to. But this would be only a question of liability arising wholly between the principal and the agent. The act itself would be within the scope of a cashier's authority and would bind the bank in favor of any innocent third party.[2] This does not necessarily conflict with the rule that if the bank nominates a certain person to receive money, it will be bound only by payments made to him. For though the bank may nominate a receiving teller, yet the cashier has a co-ordinate power with him in this respect by virtue of the general scope of his agency. The bank simply has two officers competent to receive, instead of only one. But though the cited case seems to go the length of sustaining this doctrine, the opinion embodying the views of the court is far from carrying perfect conviction with it. Practically the confusion incident to conduct in accordance with the rule would breed endless mischief. As matter of strict law, it is certainly fair to argue that the especial action of the bank in giving to another the charge of a function which *otherwise* would belong to the cashier, is equivalent to a public taking away of that function altogether from the cashier. The teller is the cashier's subordinate and must take orders from him. But

[1] Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 16 N. Y. 125.
[2] State Bank *v.* Kain, 1 Breese, 45.

the precise act of receiving or paying cash over the counter may be regarded as exclusively within the teller's province by virtue of the supreme order of the board of directors, with which even the cashier cannot interfere.

The actual keeping of the books of the bank is a business which must nearly always be delegated, in a great measure at least, to book-keepers. But the cashier ought to exercise that degree of constant supervision, which will satisfy him that the books are kept upon a proper and thorough system; that the entries are made with promptitude, and so far as can be seen, with accuracy. He may not be able to detect at once a false entry, but he should preserve that constant observation and keen scrutiny which are the best moral and practical precaution that it is possible to take to secure the honesty of the clerks. If the books are kept in a slovenly, unbusiness-like manner, and upon a system so bad that they are not clearly and easily comprehensible to practised accountants, but easily admit of mistakes, and therefore even invite to fraud, the fault will be constructively that of the cashier. He should regulate the system, and should enforce its accurate fulfilment by the book-keepers, who are his own immediate subordinates, and ought to be under his direct control.

Collection of Debts.

It is the duty of the cashier to superintend the collection of debts owing to the bank, and to make up the accounts of the sums due. Payment of them is properly made to him in his official capacity, and discharges the debtor even though the cashier subsequently misappropriates the money and fails to bring it to account in the bank. Upon the receipt of payment the cashier may deliver up the evidences of indebtedness held by the bank, may execute an acknowledgment, release, or acquittance to the debtor if need be, and may deliver and transfer back to him any pledge or collateral security given by him to

the bank.[1] It has even been held that where the borrower had given a mortgage of real estate to the bank, the cashier might legally discharge the same by virtue of his ordinary authority. Or if the bank has bought the mortgaged property at the sheriff's sale, the cashier may assign the certificate of sale. It makes no difference though the instrument may require to be executed under the corporate seal. The party who has made the payment is entitled to the discharge or assignment. In seeking to obtain it, he is justified in dealing with the principal business officer of the bank. After all it is a mere formal act, and though the corporate seal is required yet the ordinary assumption of the importance and high character of sealed instruments can hardly be said to attach to these proceedings. It was also suggested in the Bank of Vergennes case, that if the directors alone could act in the matter, they might practically rob the payer of his legal rights, either by refusing to meet at all, or by neglecting to take action in the premises.[2]

This power of the cashier is based upon the fact that he is the officer having the responsible charge and control of the entire personalty of the bank for all ordinary executive purposes. Though if any portion of the personalty has been withdrawn from his charge and control, and devoted to any special use by the government, as where the directors had deposited a mortgage in pledge with the State authorities, the power of the cashier over the portion thus appropriated by his superiors in control ceases.[3]

Whatever preliminaries are necessary to precede a valid demand for payment should be attended to and performed in due shape and season by the cashier. Such is the indorsement of notes payable to the order of the bank, and the transmission of them to proper agents in time for demand, if they are payable at any distant place. The indorsement must be made in

[1] Concord *v.* Concord Bank, 16 N. H. 26; Badger *v.* Bank of Cumberland, 26 Me. 428; United States *v.* City Bank of Columbus, 21 How. 356.

[2] Ryan *v.* Dunlap, 17 Ill. 40; Bank of Vergennes *v.* Warren, 7 Hill, 91.

[3] Mitchell *v.* Cook, 29 Barb. 243.

form according to the orders of the directors or the established usage of the bank in its dealings with the agent to whom the note is to be sent. Thus it may be an indorsement in blank, an order to pay to the agent, or to the agent or his order, or to the agent for collection, or to the agent or his order for collection. If the cashier whose duty and authority it is to make the indorsement in a certain one of these forms makes it in another, as between himself and the bank, it is a breach of his official duty; and if any injury results therefrom he may be held liable in damages. If the note is not promptly paid, so that the formalities of protest become necessary, it is the duty of the cashier to see that the note is duly sent to the notary with proper instructions.[1] The cashier may also, it has been said, deliver notes to an attorney for collection, authorizing the institution of suits upon them, if it be necessary.[2] Probably this is sound law, though we have only one case in support of it; and in that case the court finally propped the decision, which it at first inclined to render upon general principles, by stating that the particular cashier had been shown to have done the same thing before, and always with the knowledge and sanction of the corporation when it became notified of his action. The only objection to the admission of the doctrine lies in the fact that, as we have already seen, the whole business of litigation is generally deemed to lie strictly within the province of the president. The cashier cannot appear and defend suits on behalf of the bank. Though he is financial officer and in charge of the books, and so might be supposed to have a peculiar knowledge in the matter, he cannot answer even where the bank is summoned as garnishee.[3] The only case where he has been allowed to take any part whatsoever in legal proceedings is one which was decided in Illinois, wherein his appeal was allowed to be good on behalf of the bank. This single

[1] Hartford Bank *v.* Barry, 17 Mass. 94. The special power of indorsement is discussed, with authorities, *post*, p. 151 *et seq.*

[2] Eastman *v.* Coos Bank, 1 N. H. 23.

[3] Branch Bank *v.* Poe, 1 Ala. 396.

case[1] is so utterly at variance with the general and uniform current of opinions upon the subject that it might very probably be expected to be overruled. Yet it does not seem unreasonable to sustain the views of the New Hampshire bench. Where the decision as to the wisdom of entering upon litigation involves the consideration of doubtful points of evidence and law, as must always be more or less the case in all disputed claims, the higher discretion of the president may properly be demanded. But the simple sending of a note to an attorney with orders to issue a writ, or even make an attachment thereon, is a simple inexpensive proceeding which might as safely be intrusted to the cashier as any other part of the process of collection. Viewing the matter practically it seems a rather technical and quibbling ruling to hold that, since the general litigation of the bank is beyond his province, therefore he cannot give directions to the bank's attorney to go through the form of uttering a writ on an uncontested note. Though if he had reason to think that the maker of the note designed to contest its validity upon any ground of fact or of law, then it loses the simplicity of a mere collection from a delinquent but undisputing debtor, and he should leave the determination concerning the propriety of a lawsuit to the customary discretion of the president.

A power certainly very much greater than this has been declared to reside in the cashier. It has been said that in the course of his fulfilment of his duty in taking all proper measures for securing the eventual collection of the debt, he may act about it by way of compromise.[2] Fortunately this otherwise wide discretionary power is in some degree restricted by the addition in the New York case of the requisition that his action should accord with usage and the course of business. Unless the same restriction is added in the Pennsylvania case,

[1] Moreland *v.* State Bank, 1 Breese, 205.

[2] Bridenbecker *v.* Lowell, 32 Barb. 9; Bank of Pennsylvania *v.* Reed, 1 Watts & S. 101.

it must be said that that case is at variance with general principles which it cannot be potent to alter so materially. Without these words it must be simply impossible to reconcile these decisions with those which have been already cited as conferring upon the directors the power of compromising claims of the bank. Evidently the power is discretionary, and one which in its exercise may often call for considerable reflection and a high degree of judgment. It is strictly a sacrifice at least of nominal property of the bank. Evidently by good rights it should be a function of the board and not of the executive officer. The cited decisions must be construed simply to intend that this function, though properly directorial, is nevertheless not inalienably so, and may therefore be delegated to the cashier; and that such delegation may be conclusively presumed as against the bank upon proof that the usage and ordinary course of business in the bank is to that effect. Strictly speaking this is all that the cases really decide, and it is obvious that they should not be carelessly stretched as if they announced the general doctrine that it is an inherent element of the cashier's general authority to compromise on behalf of the bank any of its debts or demands.

Where a claim of the bank has been pushed to judgment and execution, the cashier, delivering the execution to the sheriff to levy, has not authority to bind the bank by any undertaking to indemnify the officer. His agreement to this effect, though purporting to be made by him in his official capacity, will be invalid as against the bank, though it may operate to hold him personally.[1]

Power of Borrowing.

The cashier may borrow money on behalf of the bank, and may bind the bank by a promissory note executed therefor.[2]

[1] Watson v. Bennett, 12 Barb. 196.

[2] Barnes v. Ontario Bank, 19 N. Y. 152; Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Sturges v. Bank of Circleville, 11 Ohio St. 153; Ridgway v. Farmers' Bank, 12 Serg. & R. 256.

Such is the usage of the banking business. Though if in any individual institution any other officer is selected for this duty, the cashier could no longer bind the bank to any lender who was aware of the variation. The right of borrowing is a function of which he will be wholly deprived by the act of the directors in selecting any other person as their general borrowing agent. But the usage to allow him to borrow is so universal that notice of the deprivation must be brought home to any person who is to be affected by it. Otherwise the public are warranted in dealing with him on the assumption that he possesses it. The power extends only to borrowing in the ordinary course of the daily business of the bank. For example, if the bank be behindhand at the clearing-house, the cashier may properly borrow of any bank which has a surplus, giving in return his check or memorandum for the amount, and agreeing to pay the customary rate of interest. But he cannot borrow for the purpose simply of increasing the available funds of the bank, so that in effect its disposable working capital shall be increased. This is exercising a discretionary control over its affairs which none but the directors possess. Neither in any case can he borrow money to use for other than strict banking purposes. Any person lending to him with a knowledge that the loan is to be thus improperly used, will not create a valid obligation upon the bank. But in the absence of such actual knowledge the presumption of regularity will bind the bank to a *bona fide* lender, however wrongful and unauthorized the conduct of the cashier in the transaction may in fact have been. So if special instructions and authority are given to a cashier for the obtaining a loan or discount, whether the same are to govern him generally in all such dealings, or only in a particular instance, all persons having notice of this special delegation of power will hold the bank only upon contracts made within its limits. So far as they are concerned, it is a valid restriction of the cashier's power to deal with them. But contracts with persons without notice will bind the bank,

if within the ordinary business of borrowing. It is not uncommon to empower the president and cashier to effect a loan or discount; in such case they must agree upon the contract jointly, and the cashier alone could bind the bank only to persons who believed him to be acting in pursuance of his general authority, and were ignorant of this special delegation to the two jointly. If a loan is contracted by the cashier in such a manner that it does not bind the bank, it cannot be considered that the mere circumstance of his turning the money into the mass of the bank funds, and allowing it to remain there, and to be used as part of the floating assets, will suffice to render the bank liable upon it as a corporate debt. The fact and nature of the transaction must in some way be brought sufficiently home to the official knowledge of the directors, so that their failure to repudiate and undo it must be construed to amount to an acceptance and ratification of it on behalf of the corporation. After being informed of all the circumstances, they cannot of course continue to use and employ the money and to make profit from it, without thereby assuming the duty of returning it. But nothing short of such conduct on their part will give it the character of corporate indebtedness.[1]

Power to Draw Checks.

The cashier has power to draw checks or drafts upon the funds of the bank deposited elsewhere. Indeed he is ordinarily the only officer of the institution who can legally do this. It is proper for him to designate himself as "Cashier of the ——— Bank," in order to show that he is acting officially, and that the check is intended to withdraw corporate funds. But if he fails to make this fact clear by these or any other words in the instrument, yet if the drawee bank pays the check from corporate funds, it will be protected and the payment will be valid, if as a matter of fact the cashier was acting officially and did intend to draw against the balance standing to the

[1] Ballston Spa Bank *v.* Marine Bank, *supra.*

credit of his corporation. To prove this, parol evidence is admissible, and by such evidence the paying bank may even be allowed to explain away the fact that the check has been credited upon its books to the cashier's private account, and to rebut the inference against itself, which must at first arise thereon.[1]

Charge of the Personalty of the Bank, and herein also of Indorsements.

The cashier has full charge, control, and power of disposition over all personal property of the bank, whether specie, notes, bills, bonds, or of whatsoever other description it may be. All its negotiable paper he may negotiate and transfer on its behalf,[2] and to this end may indorse it over, so as to bind the bank like any ordinary indorser on similar paper. But the character of negotiability is a strict limitation upon his inherent power. He cannot, solely by virtue of his office, pass title to non-negotiable paper of any sort, or to any other description of corporate property, as for example a judgment given in favor of the bank. His action in making such transfers can be sustained only by authority directly conferred by the directors, or arising from established usage.[3] Of course this power of transfer, like almost every power which an agent can possess, may easily be so abused by him as to render him liable to his principal. It is very difficult to say precisely how much discretion can be properly exercised by the cashier in trading in negotiable securities. Clearly he has no right to push it to that point where virtually it becomes a considerable and im-

[1] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; United States *v.* City Bank of Columbus, 21 How. 356; Merchants' Bank *v.* Central Bank, 1 Kelly, 418.

[2] Wild *v.* Bank of Passamaquoddy, 3 Mason, 505; State Bank *v.* Wheeler, 21 Ind. 90; City Bank *v.* Perkins, 29 N. Y. 554; Cooper *v.* Curtis, 30 Me. 488; Kimball *v.* Cleveland, 4 Mich. 606; Crocket *v.* Young, 1 Sm. & M. 241; Everett *v.* United States, 6 Port. 166; Bridenbecker *v.* Lowell, 32 Barb. 9.

[3] Barrick *v.* Austin, 21 Barb. 241; Holt *v.* Bacon, 25 Miss. 567.

portant branch of the bank's business, and is nevertheless conducted solely by himself. It was never contemplated either by the legislature in conferring the franchise or by the stockholders in investing their capital, that trading in negotiable securities, if carried to such an extent as to become an essential and vital element in the corporate business and prosperity, was to be conducted solely upon the single discretion of the cashier. The management of the important affairs of the institution was intended to be the function of the directors. We can only state this principle in general terms. It would be a matter of infinite difficulty to draw the boundary line, and no adjudicated cases assist us in so doing. Certainly in a well-ordered bank the directors would not allow the cashier to usurp their powers improperly in this respect. Nor could he do so without their knowledge. It may also happen that a cashier may wilfully make a transfer or indorsement in direct disobedience to special directorial instructions. But in any of these cases of improper transfers by the cashier, he simply renders himself responsible to the bank for the consequences of his misconduct. The outside party dealing with him in good faith, and without notice of the irregularity, holds the bank as if the transaction had been unobjectionable throughout. For it is an inherent power of the cashier, which he exercises simply by virtue of his office, to make the transfer, and no person can be required, in a case where no circumstances of suspicion put him upon inquiry, to go behind this authority. If the agent exceeds it, the matter lies wholly between himself and his principal.[1]

[1] City Bank *v.* Perkins, 29 N. Y. 554. In this case the cashier had pledged a note which it was urged he had no right to do. The suit was brought by a *bona fide* holder for value and without notice, claiming under the cashier's indorsement, against the maker. The court did not pass upon the cashier's authority, holding that, whether he had it or not, yet the plaintiff had a sufficient title to protect the maker in paying to him and could oblige him to do so. Gillett *v.* Phillips, 8 Kern. 114. Transfer by cashier of notes to an amount in excess of what he may legally transfer, is void, *except* as to *bona fide* holder without notice. St. Louis

Since the cashier has the general power to indorse over bills and notes of the bank, for the purpose of passing title therein, he of course has the lesser and included power to indorse for special purposes, as for discount. So also for collection, and for transmission for collection, he may indorse both paper belonging to the bank and paper intrusted to it for collection, or given to it as collateral security.[1] If paper is indorsed by him for this special and limited purpose, and is subsequently fraudulently converted, yet if the indorsement be general and the paper comes to the hands of a *bona fide* holder for value and without notice, who presumes and has a right to presume from the style of the indorsement that it was made in the ordinary course of business, and created a guaranty on the part of the bank, the bank may be held to respond as an ordinary indorser.[2] The risk is voluntarily incurred by the bank in putting its indorsement in such a form that it does not convey notice of its true character when an attempt is made to use it fraudulently. It has been specially held that a cashier has power to indorse over negotiable paper in payment of debts of the bank;[3] also as preliminary to demand and notice, and to the institution of a suit upon it.[4] But these limited powers are of course included in the general authority, which is amply supported by abundance of judicial decisions, and which may be stated in the broadest terms: That the cashier by his indorsement of negotiable paper on behalf of the bank will always bind the bank to the full extent that any individual indorser of like paper and in like form would be bound, unless the holder of the indorsed paper took it with actual notice of some fact rendering the indorsement irregular and

Perpetual Ins. Co. *v.* Cohen, 9 Mo. 416. Transfer in bad faith binds in favor of *bona fide* holder for value and without notice.

[1] Elliot *v.* Abbot, 12 N. H. 549; Corser *v.* Paul, 41 id. 24; Potter *v.* Merchants' Bank, 28 N. Y. 641.

[2] Robb *v.* Ross County Bank, 41 Barb. 586.

[3] Crocket *v.* Young, 1 Sm. & M. 241.

[4] Hartford Bank *v.* Barry, 17 Mass. 94.

invalid. Many of the cases cited, *supra*, note 2, p. 151, assert that the consideration for the transfer need not appear upon the instrument, but will be presumed. The presumption is open to rebuttal by proof that no consideration or only an inadequate one passed. But rebutting evidence of this description can be used only against the original transferree or against a subsequent holder with notice.

A clerk who in the temporary absence of the cashier is charged with the performance of the duties of that office, does not succeed to the cashier's full powers, unless by virtue of a special vote and instructions from the board of directors. Otherwise the cashier can clothe him with no greater power than simply such as is necessary for carrying on the usual and ordinary business of the bank, such as the payment of checks, the receipt of payment upon notes held by the bank, and the delivery up of the paid notes. But the delegate has no authority to *transfer* or *pass title* in any paper of the bank. Paper held by the bank in its own right or for collection for other persons, and payable elsewhere, he may *transmit* to the agents of the bank for collection, and if it requires indorsement as preliminary to collection, he may indorse, but only in such limited form as is strictly indispensable for enabling the collection to be made, and not so as to vest any other or higher title in the indorsee. Where he so sends forward notes for collection, whether bearing his indorsement on behalf of the bank or not, the agents receiving them will acquire no title in them and no lien of any description upon them for any balance due from the transmitting bank, unless it should ever be held that the naked act of transmission for collection itself creates a lien.[1]

The various forms of indorsement which have been employed by cashiers have given rise to important questions concerning their respective validity. The possible divergence seems to be limited substantially to four different methods, viz., "——— Bank, by A. B., cashier;" "A. B., cashier of the ——— Bank;

[1] Potter *v.* Merchants' Bank, 28 N. Y. 641.

A. B., cashier;" or finally simply the name of "A. B." without any other words whatsoever. These are the four cardinal forms which alone call for consideration. Others are only slight modifications of these, such as, "For the ——— Bank, by A. B., cashier," or verbal variations by the use of simple abbreviations, as "cash." or "cas." Such will be easily recognized as substantially identical with one or other of these four, and will be governed by the same rules, respectively.

It will be obvious at once to every professional man that the first of these forms is the technically proper one, and indeed is the only one which could be supported at strict law. It alone accords with the old established rule of the common law of agency, that where a contract is made through an agent, the principal must be directly named as the contracting party, properly with the addition of further words sufficiently indicating that the principal in this particular case is contracting through the instrumentality of A. B., authorized agent, and the signature must be in like manner of the name of the principal with the additional statement that it is written by his agent on his behalf.[1] But though it is safest and wisest always to indorse in this manner, and so to obtain the full protection of the ancient and general principle, yet special decisions have declared other forms, theoretically less correct, to be sufficient. So it can no longer be questioned that the second and third forms will bind the bank.[2] The words appended in those to the cashier's name certainly signify very clearly that he was indorsing officially and on behalf of the bank, and that the

[1] Spear v. Ladd, 11 Mass. 94.

[2] State Bank v. Fox, 3 Blatchf. 431; Bank of Genesee v. Patchin Bank, 8 Kern. 309; Northampton Bank v. Pepoon, 11 Mass. 288; Folger v. Chase, 18 Pick. 63; Robb v. Ross County Bank, 41 Barb. 586; Elwell v. Dodge, 33 id. 336. In this case it was held that the indorsement of "A. B., president" should be construed as the indorsement of the corporation upon proof furnished of the uniform usage of the corporation to indorse thus through its president. Ordinarily the president has no authority to indorse on the corporate behalf. Marine Bank v. Clements, 3 Bos. 600. The principle in this case is identical with that illustrated by the other citations.

contemporaneous intention and understanding of both parties was that the bank should be bound by the indorsement. As a matter of fact, probably in all such cases that ever occurred, the undertaking was really that of the bank, and the law with its usual flexibility in such circumstances found little difficulty both in sustaining it as such, and at the same time in adroitly saving the integrity of the ancient theory. It was declared that since the intent was to be regarded as sufficiently certain upon the face of the instrument, the holder was authorized to write above the signature the phrase "For the ——— Bank," or "The ——— Bank, by," &c., or any other words that might be necessary, fully to express and to carry out the intent; also that he might strike out any superfluous or inconsistent words originally written. The authorities which adopt this theory, and support the legality of indorsements made in the described forms, are ample to put the matter beyond the possibility of any future doubt. The only contrary decision to be found in the reports is one rendered by no higher a tribunal than the Supreme Court of the State of New York, and this was very brusquely disposed of by a judge upon the same bench a short time after it had been given. His language was as follows: "The decision in the Bank of the State of New York *v.* Farmers' Branch of the State Bank of Ohio, 36 Barb. 332, is not a controlling authority; for I understand it has been reversed by the Court of Appeals; *and we must presume that the court, in giving that decision, were not aware that the point had been often decided the other way.*" It is not to be supposed that any learned justice will ever again lay himself open to such imputations upon his professional knowledge. It is going a good way certainly to uphold the third form wherein the name of the corporate principal does not appear at all. The facts of what bank the indorser was cashier, and consequently what corporation was bound by his signature must be shown by extrinsic evidence, and may well have been unknown to some even of the holders of the paper, if it has been widely

negotiated. But the adjudicated cases support both forms without partiality. Indeed they nearly uniformly discuss only this third form. It seems as though the second form had always been tacitly admitted to be good, and only the third had held out hopes enough of invalidity to encourage litigation.

But far as the courts have gone in declaring the indorsement in the third form to be binding as the indorsement of the corporation, they have yet much further to go if they are resolved to sustain the validity of the fourth form as a corporate undertaking. We find no adjudicated case which directly settles this point. But Judge Denio, in the case above cited, of the Bank of Genesee *v.* Patchin Bank, declared that it was "essential to the operation of the rule" (to wit, that the holder might supply, in the second and third forms, the name of the bank in such shape as to make it a principal indorser) "that the authority of the indorser to indorse for the corporation and to bind it, in full and due form, should positively *appear*." "Appear" doubtless means appear on the face of the instrument, not appear from extrinsic evidence. It is somewhat hard to reconcile with the strict force of this rule, the support of the indorsement of "A. B., cashier," but it would be absolutely impossible if the language of the learned judge means any thing whatsoever, and it certainly has the ring both of sound law and of sound sense, to sustain the simple indorsement of "A. B.," without more, as the corporate indorsement. Yet we are deterred from asserting that this view is certain law by the argument which might be based upon some of the abstract principles laid down in the opinion delivered in the case of the Mechanics' Bank of Alexandria *v.* The Bank of Columbia.[1] The instrument which demanded construction in that case was a check signed by the cashier. But the analogy is close, and perhaps the subject of how a cashier should sign checks drawn on behalf of the bank may be discussed here as appropriately

[1] 5 Wheat. 326.

as elsewhere. We shall give the bulk of the decision of the learned judge in his own language.

Form of Signature of Checks.

The facts were briefly these: William Paton, Jr., cashier of the Mechanics' Bank of Alexandria, drew a check in form as follows: —

Mechanics' Bank of Alexandria.

No. 18.	MECHANICS' BANK OF ALEXANDRIA, June 25, 1817.
Cashier of the Bank of Columbia,	
Pay to the Order of P. H. MINOR, Esq., Ten Thousand Dollars.	
$10,000.	WM. PATON, JUN.

Minor was the teller of the Mechanics' Bank. The check was one of the printed blanks from the official check-book of the bank. Other checks had been customarily drawn by the cashier on behalf of the bank, in the like form in all respects save that he usually added "Cas" or "Ca" to his name. Much testimony was introduced with the object of showing that in drawing this check he was acting officially and intended to draw it on behalf of the bank. Mr. Justice Johnson delivered the opinion of the court, substantially as follows: "The merits of this case lie within a very limited compass. The question is, whether a certain act, done by the cashier of a bank, was done in his official or individual capacity? Had the draft signed by Paton borne no marks of an official character on the face of it, the case would have presented more difficulty. But if marks of an official character not only exist on the face, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensable. . . .

. . . Upon comparing the exceptions [taken] with the ev-

idence it does not appear that they affirm any other proposition growing out of that evidence, but that the check on the face of it purported to be the private check of Paton; and no extrinsic evidence could be received to prove the contrary.

"The ground on which it can be contended that this check was a private check is, that it had not below the name the letters "Cas" or "Ca." But the fallacy of the proposition will at once appear from the consideration that the consequence would be that all Paton's checks must have been adjudged private. For no definite meaning could have been attached to the addition of those letters without the aid of parol testimony.

"But the fact that this appeared on its face to be a private check is by no means to be conceded. On the contrary the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction: to which must be added the circumstances, that the cashier is the drawer and the teller the payee, and the form of ordinary checks deviated from by the substitution of "to order" for "to bearer." The evidence therefore on the face of the bill predominates in favor of its being a bank transaction. Applying then the plaintiff's own principle to the case, and the restriction as to the production of parol or extrinsic evidence could have been only applicable to himself. But it is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, viz., that this was the appropriate form of an official check; that it was in fact cut out of the official check-book of the bank, and noted on the margin; that the money was drawn in behalf of and applied to the use of the Mechanics' Bank, and by all the banks and all the officers of the banks through which it passed recognized as an

official transaction. It is true it was in evidence that this check was credited to Paton's own account on the books of his bank. But it was done by his own order, and with the evidence before their eyes that it was officially drawn. This would never have been sanctioned by the directors unless for reasons which they best understood, and on account of debits which they only could explain.

"It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent the liability of the principal depends upon the facts; that the act was done in the exercise and within the limits of the power delegated. These facts are necessarily inquirable into by a court and jury; and this inquiry is not confined to written instruments (to which alone the principle contended for could apply), but to any act with or without writing within the scope of the power or confidence reposed in the agent; as for instance in the case of money credited in the books of a teller or proved to have been deposited with him though he omits to credit it."

It is very clear that the indorsement of the name alone of the cashier will not leave upon the face of the instrument, regarded as a contract of indorsement, any marks even possibly indicative of an official or corporate character, so that the facts of such an indorsement could not resemble very closely the material facts in this case, wherein the judge expressly says that the very form of the document raised and failed satisfactorily to decide the question of its private or corporate nature; wherefore extrinsic evidence could be introduced to explain it. But if it should be considered for this reason to be clear that this case cannot be regarded as a precedent directly in force to sustain the indorsement of the cashier's

name as the indorsement of the bank, yet it is at least equally clear that this view would be fully authorized and maintained by the general principle enunciated in the last quoted paragraph. In this absence of any precedent which we can regard as conclusive, and with two judicial enunciations, each of high authority, and pointing in opposite directions, no other course is open than to set the question down as admitting a doubt and awaiting a settlement. Our own predilection, would be strongly in favor of denying to such a contract any validity as an act of the bank. Very peculiar circumstances might occasionally make this rule work an apparent hardship. But the carelessness of persons who will offer and accept such an act on its face certainly as private as possible as if it were official and therefore corporate, will generally deserve little sympathy. Neither could banks ever be sure that they could succeed in producing evidence sufficient to save themselves from liability on any or all the personal business undertakings of their agents. We think the principle in the Mechanics' Bank case is carried as far as it should be when evidence is allowed to be introduced to give an official character and validity to contracts which on their face and to acts which in their circumstances, leave it doubtful what was in fact intended or understood by the parties, and so might with some slight show of reason have justified either the person dealing with the cashier, or subsequent third parties, in supposing that the contract or act was that of the bank. To this extent the innovation upon the rigidity of the old rule is reasonable, and is reconcilable with a sound view of the law; but further there seems to be no just reason for carrying it, and no satisfactory legal theory to lend it technical plausibility.

The law concerning the manner in which a cashier may sign checks intended to be officially drawn against deposits or funds standing in other banks to the credit of his own bank, is contained in the foregoing opinion almost as in a nutshell. Any form of check whatsoever, and any form of signature, provided

the instrument bears anywhere upon its face any indication of a corporate character, will suffice to open the door for the introduction of testimony to prove that in fact the character was corporate. It cannot be doubted that proof that the check was drawn and signed in the manner in which the cashier was uniformly wont to draw and sign when he intended to draw on behalf of his bank, and which the drawee bank was wont to pay, without objection from the cashier's bank, out of its corporate credit, would always be regarded as *prima facie* and usually as conclusive evidence in favor of the corporate character, and would wherever the interests of justice required it, be held to estop the cashier's bank from denying this character. Whence it follows that a check in any form customarily used by the cashier in drawing checks on behalf of his bank, would be sustained at law as the check of the bank, however little in accordance with old-fashioned rules might be the agent's method of signing on behalf of his principal. Difficulty could only arise where the cashier had a private account at the same bank. In such case if he should draw upon it a check purporting upon its face to be his individual check, clearly the drawee bank would not be justified in paying it from the corporate deposit. But if the cashier kept no private deposit account, and did no business on his individual account with the drawee bank, it would not be unreasonable to say that his check, though upon its face bearing no marks indicative of a corporate character, might yet fairly be assumed to be intended to withdraw corporate funds, and might be properly discharged from them. For otherwise it would be a meaningless instrument, which it is not to be supposed that any intelligent man would have issued; and even more than this, it would be a positive act of fraud on the part of the cashier. For we have already seen that it has been declared fraud to issue a check drawn on a bank in which the drawer has no funds. Under the circumstances it could be naturally assumed that the cashier had only negligently forgotten or

omitted to insert some ordinary token of the official nature of his act, and the drawee bank paying such a check in good faith from the corporate fund standing to the credit of the cashier's bank, would undoubtedly be protected in so doing.

Countersigning, as for example of the bills and notes of the bank intended for circulation, may unquestionably be properly done by the cashier in the third form. If the marks of an official character, in whatsoever shape they may be, predominate upon the instrument, as they must upon these bills or notes, they are sufficient notice to third parties. Especially if the word "countersigned" be written or engraved in connection with such signature, it will be enough.[1]

Instruments executed in Form to the Cashier.

The converse of those cases in which third parties seek to hold the bank upon the signature of the cashier, is to be found in those cases in which the bank seeks to hold third parties liable to itself upon instruments running nominally to the cashier. Here the general rule is simple enough. If, in fact, the contemporaneous intent and understanding at the time of entering into the contract or obligation, was that it ran from the third person to the bank, or to the cashier on behalf of the bank, or to him in his official character, then the bank is entitled to the performance and benefit thereof, and may enforce this right at law precisely as if it were corporately named as the party in the transaction instead of only its cashier. That words are added to the name of the cashier, more or less fully descriptive of his office, is a circumstance which is properly adduced in evidence to prove the fact of intent and understanding; and though it cannot perhaps be said that the addition of such words is absolutely conclusive of the corporate character of the transaction, since a cashier might be described as such for purposes of identification, yet it is clearly very strong evi-

[1] Bank of Utica v. Magher, 18 Johns. 341; citing Mechanics' Bank v. Bank of Columbia, 5 Wheat. 334.

dence to this effect and might perhaps, if nothing repugnant appeared in the rest of the transaction, be regarded as making out a *prima facie* case of a corporate dealing. Thus a bill or note indorsed over to or made payable to "A. B., Cashier," may be sued upon by the bank in its corporate name and capacity, and the defect in the description in failing to name the bank of which he is cashier may be supplied by parol evidence of that fact.[1]

Dealings in Bills of Exchange.

The business of dealing in bills of exchange is a department of the general business of banking. It may or may not be undertaken by the corporation, at its own option. If it is undertaken, the duty of buying and selling the bills and indorsing them over to the purchaser is within the ordinary scope of the cashier's office.[2] The presumption of his power to do so must, therefore, be imperative in favor of a third party dealing with him without notice to the contrary. But whether his general charge of this department would give him power to bind the bank by his acceptance of bills of exchange drawn against it is a matter scarcely to be regarded as beyond a question. The cashier of the Bank of Kentucky was declared, in a State court, not to have this power by virtue of his office.[3] In Michigan, however, in ruling that a cashier could not accept bills for accommodation, it was said that such an acceptance would be void in the hands of a holder with notice of its character.[4]

[1] Stamford Bank *v.* Ferris, 17 Conn. 259; Barney *v.* Newcomb, 9 Cush. 46; Wright *v.* Boyd, 3 Barb. 523; Johnson *v.* Catlin, 1 Williams, 87; Erwin *v.* Branch Bank at Mobile, 14 Ala. 307; Baldwin *v.* Bank of Newbury, 1 Wall. 234. We cannot do better than refer the reader especially to the opinion in the last-named case. It is conclusive of the whole question; and its array and discussion of the authorities is exhaustive.

[2] Lafayette Bank *v.* State Bank, 4 McLean, 208; Robb *v.* Ross County Bank, 41 Barb. 586; Marvine *v.* Hymers, 2 Kern. 223; Wild *v.* Bank of Passamaquoddy, 3 Mason, 505; Fleckner *v.* Bank of United States, 8 Wheat. 360.

[3] Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. 179.

[4] Farmers' & Mechanics' Bank *v.* Troy City Bank, 1 Dougl. 457.

From this it seems a pretty clear inference that the cashier could accept on behalf of the bank if it were for a *bona fide* purpose, not being accommodation. It is certain that the cashier never has authority to bind the bank by any of the numerous species of "accommodation" contracts, which, in one shape and another, are so common in business circles.

Where a bill of exchange is indorsed by a cashier, though only for the purpose of transmitting it for collection, he becomes a "party" to it in the sense of a statute which makes a notarial certificate of notice of presentment and non-payment to "parties" admissible as evidence of such notice; the certificate is evidence of notice having been given to the cashier, and therefore to the bank, since the subject-matter falls within the scope of his agency.[1]

The Correspondence of the Bank.

The cashier has charge of the correspondence of the bank. Letters on corporate business are properly addressed to him, and whatever statements or information are contained in them will, in law, affect the bank with notice. If the subject written about is one in which he has no authority to act, or no duty to perform, it is nevertheless his duty to communicate the contents of the letter to the officials within whose province the object-matter falls. It is his duty to see that the information contained in the letter is promptly laid before the proper person. A cashier has no power to contract for the bank, but if the negotiations concerning a proposed contract are conducted by letters he properly writes and receives these, and the assent of the third party to the propositions of the bank, expressed by him in a letter written to the cashier, affects the bank and completes the legal contract.[2]

[1] Bank of United States *v.* Davis, 2 Hill, 451.

[2] New Hope & Delaware Bridge Co. *v.* Phœnix Bank, 3 Comst. 166; Branch Bank *v.* Steele, 10 Ala. 915.

Transfer of Shares.

The cashier properly makes or superintends the transfer of shares. Any person showing *prima facie* a legal right to demand a transfer to himself, may demand it from the cashier, or from any other principal officer left in general charge and superintendence of the business of the banking house. Any officer who can properly make the transfer at all will be protected in making it, without going behind the apparent legality and propriety of the demandant's right in order to determine whether or not there is any hidden cause for objecting to it.[1] A *prima facie* title is enough. As, if one who has bought shares sold by the State assessor for taxes, asks for a certificate for them, the cashier is not only justified in giving it, but it is even his duty to do so, and the bank cannot be subsequently held liable on the ground of any original irregularity which should have altogether prevented the making of the sale.

Selection of Depositors.

The cashier is the proper officer to accept or refuse the account of one who wishes to become a depositor in the bank.[2] This of course is the case only in the absence of action by the directors in the premises. The decision of the cashier could at any time be overruled by them if they should see fit.

Of Extraordinary Acts and Special Powers and Duties.

With this closes the list of the powers and duties which the cashier may exercise simply by virtue of his office, and within the scope of which he may bind the bank by reason of his being held out to the world as cashier, and as entitled to fulfil all the ordinary and inherent functions of that office. Outside of these limits, however, there are great numbers of acts which

1 Smith v. Northampton Bank, 4 Cush. 1; Commercial Bank of Buffalo v. Kortright, 22 Wend. 848.

2 Thatcher v. Bank of State of New York, 5 Sandf. 121.

are frequently undertaken by cashiers, which are strictly consistent with the nature of their office, and which are properly allotted to them to perform. Within this wide classification may be included every thing of an executive character, and many matters partially discretionary, or discretionary within certain limits, so that in delegating power over them the directors do not, in fact, part with any governmental authority or divest themselves of the performance of any inalienable duty. That corporate agents, especially agents having such large and important general powers as are enjoyed by bank cashiers, should be allowed some degree of latitude of discretion is inevitable, and within reasonable limits, is desirable.[1] But the power to exercise discretion, except in comparatively unimportant matters of routine, should be distinctly conferred by the directors or very clearly proved by custom. Even if it be thus conferred or proved it will be upheld only upon the condition that it is not a material encroachment or usurpation upon the governmental province. Of their obligations and responsibilities of this high nature the directors cannot strip themselves if they would. They are entitled to abdicate only by means of a direct and formal resignation.

But if the act which the cashier assumes to perform is one intrinsically perfectly proper to be committed to his charge, the law will presume in favor of a third party dealing with him that he was duly authorized to perform it. The presumption is not conclusive, and may be rebutted. The third party simply makes out a *prima facie* case, which the bank may destroy by showing that neither a directorial resolution nor any usage had justified the cashier in his assumption of power.[2] In fact, the third

[1] Stamford Bank *v.* Benedict, 15 Conn. 487.

[2] State *v.* Commercial Bank, 6 Sm. & M. 218; Commercial Bank of Buffalo, *v.* Kortright, 22 Wend. 348; Lovett *v.* Steam Saw Mill Association, 6 Paige, 54; Payne *v.* Commercial Bank, 6 Sm. & M. 24; Bank of Y... *v.* Gilman, 1 App. 440. Hill, 91; Harper *v.* Calhoun, 7 How. (Miss.) 203; Fa... the cases cited by us in ...nes *v.* Warren, 7 discussing the powers and duties of cashiers ind... In fact it may be said that a very large proportion ... support this point. Regularity and legality is always assumed.

party relies upon the character of the cashier, and trusts that that officer, doing an act which he may be fairly supposed to be enabled to do, is in truth acting regularly and under authority of some sufficient description. If he is deceived in this his trust, it can only be said that he voluntarily ran a risk in relying solely on the cashier's assumption, and that he must suffer the consequences of having neglected to assure himself from more accurate sources. The tendency of the courts is always, where an innocent party has been deceived by a cashier, to sustain the favorable presumption of the law, if it can be done; but they cannot disregard or overrule positive proof against it.

Power may be conferred upon the cashier by a resolution, general in its terms, and not requiring to be repeated when each specific occasion for the exercise of the power comes up.[1] But proof that no resolution was ever passed by the board in the premises does not suffice to rebut the presumption aforesaid. This is only one of the props on which it is assumed to rest. Verbal directions from the board are amply sufficient. Usage and tacit approval still remain as possible or probable supports. All these must be negatively disproved before the burden is shifted upon the shoulders of the innocent dealer or contractor.[2] Neither need the usage be specific in its character and confined to acts of precisely the same description as the one in question. If the directors have for many years allowed the cashier to do, without interference, all the business of the bank, they are held thereby to have conferred upon him authority to do any thing and every thing on the corporate behalf which the charter or law does not absolutely prohibit and forbid[s the] cashier to do, and so render illegal under all circumstances. If the cashier has a power so wide and liberal as this, it is nee[dless] to prove an usage to do any particular act which he may have [un]dertaken. If the act does not fall within the

[1] Elwell v. Dodge, 3[...]b. 336; Howland v. Myer, 3 Comst. 290; Gillett v. Campbell, 1 Den. 520; Ban[k of] Vergennes v. Warren, 7 Hill, 91.

[2] Bank of Vergennes v. W[...] 7 Hill, 91; Stamford Bank v. Benedict, 15 Conn. 487.

limits of unavoidable and inherent illegality, it is valid and binds the bank, though a precisely similar act may have never before been undertaken by the cashier since the creation of the institution.[1] This doctrine is certainly as liberal an one towards innocent outsiders as it could be possible to advance with any show of reason. At the same time it is perfectly just and sound, and is in every way fit to be sustained as established law. One case, and only one case, appears to have gone farther. In Pennsylvania[2] the court were discussing the power of the cashier in relation to the collection of debts owing to the bank. They declared he had the power to compromise, a ruling which has been already discussed, and which certainly was going pretty far. They then laid down this remarkable position, that in particular cases his authority may be extended by the nature of his agency and by implication arising therefrom, according to the pressure of circumstances in the business in hand; and in reference to the facts under consideration they were of opinion that the "necessity" of doing the act conferred upon the cashier the power to do it, which otherwise he would not have possessed. There is certainly sound reason, and probably sound law, in the doctrine that stringent necessity growing out of the unmistakable interests of the bank may sometimes justify a cashier in doing on its behalf some act which in the absence of the emergency he could not properly do; provided — and it is an essential proviso — the act be strictly consistent with "the nature of his agency." If the language of the court is to be construed as advancing only the principle that extraordinary cases may arise in which the courts will sustain the cashier in an act dictated by an obvious and imperative necessity, which he could legally perform under the authority of a usage or a directorial vote, and which it must be presumed the directors would unquestionably have authorized him to perform had they had warning of the need, and therefore had oppor-

[1] City Bank v. Perkins, 4 Bosw. 420; 29 N. Y. 554.

[2] Bank of Pennsylvania v. Reed, 1 Watts & S. 101.

tunity to act; — if this is what is intended, the doctrine is in the interest of justice and common sense, and may well be adopted into the body of legal principles. But if the theory was advanced that whatever seems necessary, in the liberal interpretation of that flexible word, to be done, may be legally done by a cashier simply by virtue of that necessity, that the power grows out of the circumstances of the particular case, it is bad in law and mischievous in fact. No decision of any other bench, no language of any other judge, recognizes the existence of any such shifting and utterly indefinite test of the powers of a cashier. To admit it would simply be to introduce complete uncertainty and to encourage litigation. Few men would abandon without an effort the chance of persuading a jury that it was in fact quite "necessary" for the cashier to deal as in fact he had dealt. Even in the sense in which we approve the doctrine, we acknowledge it to be a very dangerous one, needing very cautious and very sparing use, if it is not to prove an evil rather than a good. To extend it beyond the sense of a great and extraordinary emergency is to make it an unmitigated evil, but also fortunately to leave this single enunciation an isolated *dictum*, unsupported by so much as the shadow of any other authority. It is like a subtle poison, potent for good if administered sparingly by a skilled and prudent physician, but fatal if too freely used.

Of Limitations of Time and Place upon the Cashier's Powers.

The place where and the time when a cashier is called upon to do, or undertakes to do, acts on behalf of the bank are often circumstances materially affecting his powers in the premises. For some purposes he is cloaked with his official character only at the banking house and in banking hours; for other purposes he remains cloaked with it at all times and places. No better rule for discriminating between these two classes presents itself than to say, that, as there are some acts which can only be properly performed at the office of the corporation and during

the hours ordinarily devoted to public business, so there are other matters which may be transacted equally well at all times and places. The distinction is a purely practical one, arising from the intrinsic character of the transaction itself regarded from a business point of view. A test which is perhaps as accurate as any that could be suggested is furnished by the question whether for the due performance of the business there are requisite any knowledge or appliances which can only be satisfactorily and fully possessed by the cashier when he is at the banking rooms. It is easy to point this rule with examples which will be serviceable in illustrating its precise significance. Thus it cannot be pretended that any sound reason could restrict the power of the cashier to draw checks to a power to draw and sign them only in the office of his own bank and in the ordinary business hours. Even prudence might sometimes induce him to draw them elsewhere, as at the rooms of the drawee bank, to avoid danger of loss or fraud. So if any person wishes to impart information so as to warn the bank or to affect it with notice, it would be absurd to say that he could do so effectually only if he should make his communication to the cashier actually within the walls of the banking house and before it was closed to the public for the day. There would be no reason in such restrictions, and there is no law in their support.

But on the other hand it is obvious that a cashier ought not to make a payment upon, or to certify or accept, a check or draft when he is away from the bank. He may have money, and money of the corporation, enough to make the payment, in his immediate personal possession at the time. He may have been absent from the bank but very few minutes, and it may be that the check, if presented when he left, would have been properly paid or certified or accepted. Still even in that short interval the drawer's account may have undergone so material a change by reason of payments made or drafts accepted on his account, or perhaps by force of garnishee process

served upon his funds in the bank, that his checks could no longer be honored. In that case the payment, certification, or acceptance having been wrongfully made by the cashier, would become his own individual loss, and he would be obliged to reimburse the amount to the bank, if the bank should see fit to accept and ratify instead of repudiating the proceeding. Clearly the same must also be the case if later in actual time than the payment, certification, or acceptance by the cashier, but still prior to his return to the bank and entering or noting the transaction to the debit of the drawer, or informing the proper officers of its having been made, any other disposition had been legally made of, or any other valid lien had attached upon, the drawer's funds or credit. Otherwise a loss would be inflicted upon the bank solely and wholly by reason of improper conduct on the part of its officer. For the damage arising from such improper conduct the agent is answerable to the principal, if the principal assumes or is compelled to make good the error. In fact, in the supposed case of the payment made in this manner the cashier practically renders himself the agent of the drawer for the presentment and collection of the check, and in expectation that when he can arrive at the bank and present it there will be no obstacle to its full payment, he ventures to advance upon it to the drawer its full face value. The risk of intermediate transactions diminishing or destroying the security is his own private risk, the loss if any is his own private loss. The same reasons might make the certification or acceptance binding against him personally. His acceptance thus made on behalf of the bank can be repudiated absolutely by the bank, if events transpiring before his return to the office and entry or report of the transaction would render the making of the acceptance at the time of the return and entry or report improper. This would at least be the case so long as the acceptance remained in the hands of the party obtaining it or of any other party having notice of the circumstances attendant upon its making, for these persons would be affected with a presumed knowledge of the

rule of law rendering this undertaking of the cashier irregular.[1] But since the instrument would probably be perfectly regular on its face as the acceptance of the bank, and would in fact have been executed and issued solely through the improper exercise of a power really lodged in the officer of the bank, it is probable that a *bona fide* holder for value and without notice would be allowed to enforce it against the corporation. Whether the bank could be held by the acceptance, if the cashier on his return failed to report it, the drawer having then funds enough, is a difficult question. It cannot be said that in making the acceptance, as in making the payment, the cashier assumed a position in any degree resembling that of an agent for the holder. On the contrary his act assumed to be and could be, throughout, only purely official. Upon his return to the bank it was his duty to report it and have it duly entered. This must perhaps be regarded as his official duty. Accordingly it may be argued that his neglect of it would leave the bank still bound to the third party, though entitled to hold the cashier liable to make good any damage to itself. On the other hand this position can be assailed by urging that the transaction was from the outset void as an undertaking of the bank, or, if not actually void, yet so far irregular and invalid as against the bank that it can be made good against it only by a thorough re-performance in full of all essential acts. The party dealing with the cashier may well be held to take the risk of the cashier's faithful conduct in these particulars; which upon the other hand the bank cannot possibly be regarded as warranting, since the whole proceeding, *ab initio*, was directly in contravention of the principles of the agency which it had established.

An interesting and important question, similar but not quite identical, is raised where the cashier receives payments of money for credit on an ordinary deposit account, when he is

[1] Bullard *v.* Randall, 1 Gray, 605. The opinion in this case was delivered by Chief Justice Shaw, and has always been relied upon as a thoroughly satisfactory and conclusive authority.

away from the bank. This limitation is annexed to the simple word payment, because perhaps the case of receiving payment of a debt due to the bank might be different. In many cases the law requires the creditor to make demand upon his debtor. And unquestionably a cashier may follow up a delinquent or doubtful debtor of the bank and exact payment from him at any time and place when and where he may be able to do so. But where money is offered for credit on a deposit account it is clear that it should not be accepted away from the bank. The bank does not contemplate any such method of receiving deposits, but has provided an entirely different system. Clearly therefore, it does not empower its cashier thus to receive them. He cannot bring them instantly to account in the bank, nor secure them with the safeguards always provided in banks for the preservation of their funds. But if he does so receive them and then loses or misapplies them before he has actually transferred them into the corporate possession, the question arises can the payer hold the bank to make good the amount? Clearly, we say, he cannot. Even though the cashier may have had the identical money in his pocket at and after the time of his return to the bank, nothing short of his actual transfer over and bringing it to account in the bank can make the bank liable. The transaction, even in this form, still differs materially from the case of an acceptance previously supposed. In that case the cashier was acting strictly as an agent of the bank. He could possibly do the act in no other capacity. Whereas in taking the money it must be held that he was acting as agent for the party paying it; the trust and object of his agency being, that he should make the payment into the bank to the credit of the payer's deposit account. He was the agent of the payer for this purpose, selected as a convenient agent because he was also an agent of the bank. The money was paid to him doubtless *because* he was cashier, but it was not paid to him *as* cashier. The latter character could not be given to the transaction, even if both parties sought to do so; for they

must both be affected with knowledge of the rule of law which rendered a payment made under such circumstances irregular and improper, and so invalid as against the bank. It is fair then to say that in no part of the transaction can it be admitted that the cashier was acting officially, even though irregularly so. His act should be regarded, not as irregularly official, but as absolutely unofficial. Therefore the obligation which he owed to pay the money into the bank ran to the party paying it to him for that purpose, not to the bank; his breach of it would make him liable to that party, not to the bank; the loss arising from the breach must be borne by that party, who was in fact his principal in the agency, not to the bank, who was known to all concerned to have strictly excluded any such function from the scope of his official agency.

The three instances adduced differ very considerably in the force of the arguments which can be brought to make them respectively acts for which the bank is liable. But it seems to us that in all alike the non-liability of the bank is undeniable. Though the cashier ought on his return to the bank to report the acceptance he has made on its behalf, or to pay over the money he has received on its behalf, and though if he should then promptly report and enter the acceptance the drawer's account might make it good; or though he may have the identical funds paid over to him still in his pocket, yet in both cases it is clear that the person dealing with him knew, or was at law bound to know, that the dealing was under the circumstances irregular, improper, and beyond the scope of the cashier's agency. The transaction might be capable of being made right in the future when the cashier should return to the bank. But until that time, and until as a matter of strict fact it had actually been so made right, it must be invalid as against the bank. That it should not be made right at all is a chance which may come to pass, either through the mistake, the negligence, the innocent loss, or the fraud of the cashier. Now clearly the third party takes the chance of the mistake or the

loss, and why not equally of the negligence and the fraud. He trusts that every thing will go right, that the cashier will be careful and honest. But the sufficiency of both the care and the honesty is his own risk; for he has confided in them of his own independent motion, not under the invitation or holding out of the bank; but in fact with the express knowledge, either actual or conclusively inferred at law, that the bank warrants neither when they are relied upon under such circumstances.

The decision in Pendleton *v.* The Bank of Kentucky[1] does not at all interfere with the above doctrine. The court certainly remark in that case that the cashier holds his office at every time and place. But the point of view from which they make that remark explains its intended significance. They were discussing the question of whether the cashier's conversion of money improperly received by him when away from the bank was a default which would sustain a suit upon his official bond, and it was in the course of declaring that it would, that they made the above remark. It cannot be questioned that if the bank has waived the irregularity, and adopted or ratified the improper act, if it has fulfilled the obligation which its agent attempted to impose upon it, it has done simply what it had a right to do, and what neither the officer nor his sureties can object to. There is nothing originally void about the act, nothing which prevents the bank from subsequently accepting and ratifying it. It is unauthorized and therefore voidable, but it is no more than this. On the other hand if the bank exercises its privilege of repudiating the transaction, the right of action against its cashier cannot accrue to it, for it cannot be allowed to take the two inconsistent positions of repudiating the responsibility and yet claiming damages for a loss which it could only suffer if it were responsible.

[1] 1 T. B. Monr. 171.

The Cashier's Declarations or Admissions.

The cashier can bind the bank by his declarations or admissions only when his power to do so is a direct and necessary implication from the other powers confided to him by the bank. His authority to declare or admit is strictly incidental, never original. When, however, the statements satisfy these requirements, they may be given in evidence for or against the bank with the like effect as the authorized admissions or declarations of any other agent may be given for or against his principal; and they will be conclusive or open to explanation or to rebuttal according to the same general rules. It is likewise necessary not only that so far as the intrinsic nature of the admission or declaration is concerned the cashier might bind the bank by it, but also that he should make it officially and with the expressed or obvious intent actually to bind the bank by it. It would seem a natural rule to say that the limits of the cashier's authority to declare and admit for the bank must be coextensive with his authority to act for it; that is to say, that within whatever scope he could bind it by his actions he could also bind it by his words. The principle naturally suggests itself, and is very probably as sound as it seems, but the cases which have been already adjudicated are perhaps hardly sufficient as yet to sustain it as a settled doctrine. None of them, however, are inconsistent with it. Thus he may bind the bank by statements officially made in relation to the sale of bills of exchange or drafts;[1] the business of selling and negotiating them being within his province. His declaration that stock pledged with the bank is held in trust for a third person, may be given in evidence against the bank to prove notice of the trust;[2] it being his duty to take charge of all the property belonging or pledged to the bank, to know by what title and in what capacity the bank holds the various items, and to keep them duly ear-marked.

[1] Sturges v. Bank of Circleville, 11 Ohio St. 153.

[2] Harrisburg Bank v. Tyler, 3 Watts & S. 373.

On the other hand it can never be pretended that he has any incidental powers to bind the bank by declarations or admissions which are made beyond the scope of his duties. Thus his statement or promise given to a person who is about to put his name as indorser upon a note which the bank has agreed to discount, to the effect that such person will not be held liable or shall not be looked to by the bank, is altogether inoperative and void as an undertaking of the bank. For so far as the business of discounting is concerned the cashier's sole power and function is to pay over the money upon the discounted notes. Collateral contracts or agreements of any nature are absolutely beyond the range of his employment. Declarations or admissions in the nature of such contracts, are equally beyond his province, and consequently equally impotent with the contracts themselves.[1]

Payment made by the cashier upon a check bearing the forged name of a depositor, or in exchange for bills or notes falsely purporting to be those of the bank, is the payment of the bank. It is an act within the scope of the cashier's authority, and cannot be subsequently either recalled or repudiated. He is intrusted by the bank with the duty of deciding upon the genuineness of such paper when it is presented for payment or redemption. But if such paper is shown to him, not for the purpose of demanding payment thereon, but simply to inquire whether or not it be genuine, his erroneous answer that it is so will not bind the bank as an admission. For it is not his function to give such information. The bank does not intend that he should do so, or hold him out as competent to do so. When payment is demanded it is an inevitable necessity that some officer should decide whether or not the paper is what it purports to be, and this necessity the bank can in no way avoid, without destroying the possibility of banking business. But

[1] Bank of the Metropolis *v.* Jones, 8 Pet. 12; Bank of the United States *v.* Dunn, 6 id. 51; Harrisburg Bank *v.* Tyler, 3 Watts & S. 373; Merchants' Bank *v.* Marine Bank, 3 Gill, 96.

to answer all questions which may be put concerning the genuineness of the paper is quite another thing. The same necessity does not exist here, and the bank accordingly refuses altogether to assume gratuitously a task of such dangerous responsibility. Accordingly if the cashier undertakes to answer such interrogatories, his act is wholly beyond the scope of any authority given him by the bank, and ought to be known by all persons to be so. The declaration is impotent to conclude the bank. Practically if it were allowed binding force it would amount to allowing the cashier to give a valid promise on behalf of the bank to pay what the bank does not in fact owe: a power which even the directors could rightfully exercise only in extraordinary cases if ever. The difference between a payment actually made, though by mistake, and an executory agreement to pay, or acknowledgment of the sufficiency of the order calling for payment made under the sametmistake, is certainly wide enough to admit of this corresponding differencein the respective validity of the two acts.[1]

In the case of the Franklin Bank *v.* Stewart,[2] an interesting point in this subject is discussed, which cannot be better elucidated than by presenting a brief summary of the remarks of the court. Statements, it was said, concerning a past transaction are given purely as a matter of courtesy. No one has a legal right to demand them. Consequently a cashier in making them does not make them in an official character, or as an agent of the bank authorized to bind it by them. The most that can be said is that the bank does not forbid him to do an act of ordinary courtesy; but it is equally far from empowering him to impress upon that act any other and more serious character. In the Bank of Monroe *v.* Field,[3] admissions as to the fact of payment having been made upon a note, were held admissible as constituting a part of the *res gestæ*, but upon the

[1] Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Merchants' Bank *v.* Marine Bank, 3 Gill, 96; Farmers' & Mechanics' Bank *v.* Troy City Bank, 1 Dougl. 457.

[2] 37 Me. 519.

[3] 2 Hill, 445.

express ground that they were shown to have been made upon, and as the result of a contemporaneous examination of the books of the bank undertaken for this very purpose. But if the statement, though it concern a past transaction, is connected with a present dealing, the reason of the rule fails, and the rule itself shifts to the opposite doctrine. The test is well given in the following remark of Sir William Grant, in the cause of Fairlie *v.* Hastings.[1] Unless the agent's statements constitute the actual agreement of the principal, or are the foundation of, or inducement to, that agreement, they are mere naked assertions, not proofs, of the fact; and being such they amount to nothing. The facts of the first-named case, from the Maine Reports, were these: A messenger was sent to the bank to inquire whether a certain note had been paid. He did not tell the cashier that he was asking on behalf of any party to the note; it did not appear that the cashier examined the file of notes, or any of the books of the bank. But he answered that it had been paid. In truth it had never been paid, and at that moment still lay among the uncancelled notes of the bank. Upon the strength of the principles above propounded, the court held that the bank was not bound by this statement of its cashier, and this even though it was shown that a surety on the note, relying on that statement, had given up security which he held from the principal promisor. The surety had taken imperfect means to acquire the knowledge he desired, and his loss was only a natural result of his insufficient thoroughness in the transaction. The opinion delivered by Shepley, C. J., is learned and able, and the cause deserves to be deemed a leading one, even in spite of the fact that two members of the bench found reasons for dissenting from the decision of their comrades.

[1] 10 Ves. 123. To the same point, see Lime Rock Bank *v.* Hewett, 52 Me. 531.

Implications and Inferences arising from Acts of the Cashier.

The bank is bound by all the legal implications or inferences which must, as matter of law, grow out of those acts of the cashier, which he does in the prosecution of any of the functions included in his agency. Indirectly these acts often closely resemble declarations or admissions. But they may bind where a declaration or admission might not bind, as has been already seen in the cases of forged paper used in illustration above. He has power to collect and to give receipts for the sums collected, in behalf of the bank; he has power to make, or to direct his subordinates to make, the entries in the books of the bank. These receipts and entries are admissible in evidence as the acts of the bank itself, and if the mere making of them, or the peculiar form of expression used in them, have any technical legal force or effect, the bank will be concluded thereby as by the necessary legal sequence of its own doings. In Badger *v.* The Bank of Cumberland,[1] a suit was brought to hold the defendant corporation as owner of a one-third interest in a vessel. It appeared that a debtor of the bank originally owning this one-third had bonded it to the bank to secure his debt; that afterward he had stated himself unable to pay, and had abandoned his interest to the bank; that thereafter an account had been settled between the owner of the remaining two-thirds, being also the ship's husband, and the cashier of the bank; that the cashier, acting in his official capacity, had thereupon receipted for what appeared by the account to be the bank's proportion of the net earnings; that the president had requested the rendering of the account, and had insured one-third of the vessel's value for the benefit of the bank. It was held that the cashier's receipt and his entry of the transaction on the books were acts within the scope of his agency, and that their legal effect and significance, as proof of part ownership by the bank, could not be controverted by the bank.

[1] 26 Me. 428.

Also that the items of his entries in the books were conclusive proof of an adoption and recognition by the corporation of the president's acts in effecting the insurance.

Liability of the Cashier to the Bank.

The cashier is, of course, liable to the bank, in an action of damages to make good any and all injury arising from his fraudulent or wrongful acts of an official nature, from his unauthorized assumption of power, or from his breach of the directions imposed upon him to govern his conduct in his agency.[1] How far he is responsible for innocent errors and mistakes will be considered under the topic of "Official Bonds." The tellers, book-keepers, &c., are his subordinates and subagents. But he is not answerable, like an ordinary principal, for their defaults, whether intentional or innocent, unless perhaps in those cases in which it can be shown satisfactorily that the default was occasioned, or opportunity or temptation thereto was furnished, by his improper or negligent performance of his duty of general superintendence. This rule is supported by the necessity of the business. It is impossible for him to be omnipresent and omniscient among all his servants in the institution, and he is not liable for his failure to perform this impossibility. He is required only to direct them properly in the performance of their several functions, and to exercise the most thorough supervision which is practicable in view of the amount and method of conducting the routine of daily affairs in the office. The sub-officers and their respective provinces are usually well known. But if the duties which are ordinarily done solely by the cashier become too onerous to be executed by one man, any arrangement for a partial sub-delegation, which circumstances authorize the cashier in assuming to be satisfactory to and ratified by the directors, will be valid and

[1] Austin *v.* Daniels, 4 Den. 299.

will thereafter save the cashier from liability for frauds or errors committed in the delegated department.[1]

Besides the right to a suit in damages which grows out of a cashier's malversation in office, specific statutory penalties are often affixed to specific acts of wrong-doing. Whether the bank by suing to enforce the penalty deprives itself of the right also to sue in damages, must be decided by a consideration of the nature of the penalty. It is a fundamental truth that the bank has a right to be reimbursed in money for all its losses directly caused by the wrongful conduct of its agent. If the provisions establishing the penalty make any satisfactory arrangement for this reimbursement, then the proceeding for the penalty must be taken as clearly intended to supersede the proceeding for damages. But if it is not so provided in the statute it must be assumed that it was intended that the two actions might be prosecuted independently of each other. The awarding of the suit for the penalty is akin to authorizing the recovery of vindictive damages, in addition to the simple damages which may still be demanded in the other suit. The only decision of interest occurring under penal statutory provisions is one which declared that a penalty set upon the cashier's conversion of any "money, bank-bill, or note" could not be applied to his conversion either of promissory notes, not being bank-notes, ordinarily so-called and intended for circulation as currency, or of any other species of commercial paper.[2]

Acts in Contravention of the Charter or Organic Law.

It has been said that acts done by the cashier in pusuance of orders given him by the directors may bind the bank, though they be in contravention of the charter, or of the provisions of the organic law, and are therefore acts which in fact the directors have no power to authorize him to do.[3] It must be sup-

[1] Bank of the State v. Comegys, 12 Ala. 772.

[2] State v. Stimson, 4 Zabr. 9.

[3] Hagerstown Bank v. Loudon Savings Fund Soc., 3 Grant, 135.

posed, however, that the rather sweeping language used in the opinion in the case cited as authority for this doctrine, is subject to some unexpressed limitations. Thus if the party dealing with the cashier knows, or must at law be deemed to know, the original deficiency of power in the directors, it cannot be conceived that he should nevertheless be allowed to hold the bank upon that dealing, as if it were in every respect legal. Otherwise the law would be directly aiding him in taking advantage of his own consciously illegal act. It seems rather that dealings of this description put both parties *in pari delicto*, and so deprive each of the right to demand relief against the other. The respect in which the judiciary of the State of Pennsylvania has always been held, and the apparent fairness of the decision which was rendered in view of the actual facts presented in the cited case, are inducements to confine criticism to the breadth of language used in the opinion rather than to go the length of wholly denying the fundamental correctness of the precise ruling when stripped of its needless luxuriance of words and illustrations. It would certainly be desirable that the authority of the directors should be sufficient to protect one dealing with the cashier in good faith, and ignorant that some statutory provision rendered the authority given just a little in excess or contravention of the strict law. Yet it is perfectly obvious that the rigid rule is that the third party must be held to a knowledge of the public law, and by consequence to a knowledge of the illegality of the proceeding in which nevertheless he is taking part. It has been previously seen that this rule may be infringed upon for the purpose of protecting one who deals with a cashier within the ordinary province of a cashier's office; though, unknown to him, the charter sets restrictions upon this particular cashier's powers materially inside of those customary limits. No greater or more unreasonable is the breach in the general principle which is made by this case of the Hagerstown Bank, and we should like to see it sustained in cases where the facts reasonably demand it; not

certainly in all the cases suggested as examples by the fertile imagination of the judge who wrote the opinion, but in cases presenting an obvious equity. Still, standing as it does, an isolated decision, and in addition to that, also open to severe criticism, there is certainly some chance that it may not be affirmed. The case of the Salem Bank *v.* The Gloucester Bank[1] asserts generally that the bank is not liable for the act of the cashier done under the authority of the directors, if they have no power to confer that authority. The general rule must be admitted to be thus. But in this Massachusetts case no strong equity tempted the court to consider the possibility of admitting a limited exception to the broad principle.

Directorial Orders as Justification for Illegal Acts.

Whether or not as between himself and the bank the cashier could ever set up orders of the directors in justification or excuse for his performance of acts which they had no legal right to authorize him to perform may possibly be open to a slight doubt. Probably, however, he could never be allowed to do so. Whatever relaxation might be permitted, under a strong equity, in favor of an innocent third party, it would seem that the cashier at least must be imperatively held to know what it is possible and what it is impossible for him to receive legal authority to do. There can be only a very faint doubt of this, though no cases are to be found to support it. Certainly if there is any intrinsic illegality or impropriety in the act itself, the cashier cannot plead either the formal vote, the ratification, or the connivance of the government of the bank. The directors can by no possibility authorize him to commit a fraud, to misapply funds of the bank, to subject them to improper risks, to make private profits by the use of them. He can by no possibility believe that the directors can thus authorize him. The question is not who is to reap the fruits of the malfeasance.

[1] 17 Mass. 1.

The cashier is responsible for obeying an order which he knows to be illegal, and to be given for an immoral purpose, equally whether he is or is not to participate in the illicit gains. The empty semblance of obedience to superiors cannot take away the genuine character of connivance in a wrongful proceeding, and would be "void to protect the cashier in his wrongful compliance."[1] In the cited case it was held that the cashier could not be protected from liability to reimburse a loss arising from his having allowed a customer to overdraw, by showing that the directors had been wont to countenance him in a custom to allow good depositors to overdraw without taking security from them. For here, it was said, the act was intrinsically wrongful. It was a dishonest use of the corporators' funds. Being thus in itself inexcusable, it could not be excused by a mere show of authority.

Cashier as a Trustee.

It has never been held that the position of the cashier was precisely that of a legal trustee. Yet the qualities of a trust can never be wholly wanting where an agent has committed to him the care and management of the property of other persons for certain definite purposes. To say that he cannot either directly or indirectly use his influence or any of his powers to secure advantages to himself, is only to assert what no one has ever had the hardihood to call in question; and it makes no difference that his conduct was not, or was not intended to be, hurtful to the bank. If he wishes any species of accommodation from the bank, even though he might have power to grant the same to any other person, he will not be safe in granting it to himself, without express permission from the board of directors. The familiar rule of agency, that one shall not be agent for any other party in a contract in which he is himself interested, or *a fortiori* in which he is a principal on

[1] Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46; Austin *v.* Daniels, 4 Den. 299.

the other side, suffices to prohibit this. But further than this, in his own dealings with the bank, he is held, like a trustee, to exercise a much greater degree of scrupulosity and thoroughness of regard for the interests of the bank than in the conduct of like dealings had by other people with it. Thus, if he has a loan from it and gives to it his promissory note for the amount, if he does not pay the note promptly upon its maturity, it will not be enough that he treats it precisely in the same manner in which he is wont to treat other unpaid notes belonging to the bank. He has an extraordinary duty to perform in regard to it, and must bring the facts of its being overdue and unpaid distinctly before the directors in their official capacity. If the period of the statute of limitations has elapsed since the date of the note, he will not be allowed to take advantage of it simply because he has left the note in the bundle of unpaid notes, which from time to time was examined by the directors for the purpose of putting in suit such of the notes contained in it as they might see fit. The statute will begin to run only from that date upon which the cashier can establish by affirmative proof his express notification of the whole matter to the directors.[1]

But if the cashier embezzles funds of the bank and invests them, a court of chancery has no power to fasten a trust upon the investment and to declare the cashier to be a trustee, holding what he has purchased in trust for the bank. The mere fact that the cashier obtained the means of purchasing by a theft from the corporate funds, provided that he actually made the purchase in his own name and on his own account, does not create such a case of implied or resulting trust as to give a court of equity jurisdiction for the purpose of taking possession of the purchased property, and ordering that indemnification be made from it to the bank.[2]

[1] Harrisburg Bank *v.* Forster, 8 Watts, 12. See also Conyngham's Appeal, 57 Penn. St. 474.

[2] Pascoag Bank *v.* Hunt, 3 Edw. Ch. 583.

Nature of the Cashier's Control over the Promissory Notes of the Bank.

It has been said that the cashier has charge of all promissory notes due to the bank. But though he thus has actual manual possession and control of them, yet he has not that legal possession which will enable him to bring a suit upon them in his own name. His possession is in fact not really his individual and private possession, but the possession of the bank. It should rather be called custody. If he had possession, *as an individual*, of course the court would not inquire how he came by it; but since he has it as an official agent, the court will not recognize it as an absolute, but only as a qualified possession, not carrying with it the presumption of title or the right to sue.[1]

After the Expiration of the Franchise.

Where by the charter itself or act of legislature a bank is continued in existence as a corporation after the lapse or surrender of its franchise, for a limited time and for the purpose of closing its affairs, the directors may legally appoint a cashier to act during such period. Any irregularity attendant upon the choice or process of qualification of these directors will not affect the validity of the acts of the cashier chosen by them, provided they are *de facto* directors, assuming to be such under a shadow of title, and acting as such at the time of making the appointment.[2]

Estoppel.

A cashier, by performing in his official capacity, acts and duties which are not inconsistent with the nature of his office and functions, may be held to be thereby estopped in a suit against himself to deny that their performance was ordered by the board of directors.[3]

[1] Olcott *v.* Rathbone, 5 Wend. 490. [2] Cooper *v.* Curtis, 30 Me. 488.
[3] Durkin *v.* Exchange Bank, 2 P. & H. 277.

Certification of Checks.

We must now approach the much vexed question of the certification of checks. That there is no intrinsic illegality in the naked act of certification must be regarded as beyond the possibility of doubt. Perhaps it is almost the only position that can be laid down in the discussion of this topic, concerning which such perfect certainty can be predicated. The nature of a certified check, assuming the certification itself to be valid, is fully explained in the chapter on Checks. In legal effect it is the contract of acceptance of the bank, by which the bank undertakes and becomes absolutely bound as an original promisor to pay the amount named, according to the orders written in the instrument. We have now to deal with the powers and duties of the various bank officers concerning this transaction. So soon as a check has been certified, the amount should at once be debited to the drawer and credited to the payee upon the books of the bank. The payee thereafter occupies in several respects, as for example the running of the statute of limitations, the position of an ordinary depositor. Though of course he cannot insist upon the right to continue a deposit account if the bank does not wish to open it; neither can he draw checks against his credit, which is properly only to be paid over upon presentment and surrender of the accepted check. The duty to make this entry is what might be described as a purely *internal* duty. It is a part of the mechanism of the institution itself. The neglect of the officials to do it renders them liable to the bank for any consequent loss, but does not affect the rights of any outside party. For the substance of the doctrines thus far laid down we have the direct authority of the Girard Bank *v.* Bank of Penn Township,[1] a case in which the object of the court seemed to be to refrain so far as possible from saying any thing useful. Also we have the indirect authority of all the New York cases, which tacitly

[1] 39 Penn. St. 92.

assume the inherent legality of certification as the necessary basis of all their decisions.

The most common form in which to express the certification is by simply writing upon the check the word "good" followed by the initials of the certifying officer. But it is not essential that this form should be observed. Any other writing, as the name or initials of the officer, or the word "good" alone, if intended and understood to bear this meaning, will be construed accordingly. In England the "marked checks" which in some respects, though not in all, resembled our certified checks, were customarily, until the statute interfered, literally only *marked*, and bore no written word whatsoever. It makes no difference how meaningless in itself may be the method resorted to, or even that like the word "good" it might seem naturally capable of a different meaning; it will be construed in reference to the customs and usages of the business and to the understanding of the parties, and will be held valid or invalid solely in reference to this construction.

Rarely the president undertakes to certify checks; quite frequently the teller; but perhaps by far the most frequently the cashier.[1] By reason of this porportion it has always been assumed that if the power were inherent in any office it was inherent in that of the cashier. But here lies the grand question and doubt in this whole subject. Is it, or is it not, an implied power, an ordinary power, of the cashier; a power which is to be assumed as constituting one of the essential elements of his office and position which it is to be taken for granted that he can exercise simply by virtue of the fact of his being cashier? Or, from another point of view: Will his certification of a check bind the bank in favor of an innocent holder who had no notice that the bank did not intend to clothe him with any such authority? But when the question has been propounded and the doubt expressed, the limit of progress, however unsatisfactory, has been

[1] Barnes *v.* Ontario Bank, 19 N. Y. 152.

reached. No adjudicated case settles the matter; and it is with great regret that we are obliged to state that a cause of great magnitude, now pending in the Supreme Court of the United States, and in which this point promises to be directly and conclusively passed upon, is not likely to reach a decision before this work goes to press.[1]

The well-known case of Mussey *v.* The Eagle Bank[2] is the strongest authority against the inherent power. That case, it is true, passes directly only upon the power of the teller, but the line of argument is general enough to include also the cashier or the president. An effort was made to prove an usage for the teller to certify. But the evidence was declared wholly incompetent to sustain the usage, and the court went on to say that the usage, even if proved, would not have sustained the theory that the power was "inherent." For it would be an usage to allow the teller to pledge the bank's credit, a power which by the constitution of the bank can be exercised only by the corporate government or under their special delegation, and consequently cannot be an implied or resulting function of any individual officer. Certainly it is sound to say that a power exercised by virtue of an usage is strictly a power exercised by virtue of a delegation of authority which the law by reason of the usage conclusively presumes to have been made. Therefore the recognition of the fact that the corporate government *could* delegate this power carries with it a recognition also of the further fact that the usage (which conclusively implies such delegation as matter of imperative law), if proved, would be good. Yet the tendency of the court in this case

[1] The case referred to is that of the Merchants' National Bank *v.* The State National Bank, first tried in the United States Circuit Court, for the First Circuit, before Clifford and Lowell, JJ. These judges decided against the inherent power of the cashier to certify, and no evidence of custom having been adduced, they ordered a nonsuit to be entered against the plaintiffs, who thereupon appealed. The most celebrated counsel in New England were engaged in the argument of the cause.

[2] 9 Met. 306.

appeared so strongly opposed even to the validity of the usage, that it has been often cited and commented upon as if it went to this length. In point of fact it is an unavoidable logical sequence from the language used that the usage, if shown, would be valid, though perhaps this result of his own words was not recognized even by the learned judge. A little fault also can be found with the phraseology in this opinion. Certification is said to be a *pledging of the credit of the bank.* This has a formidable sound, as though an act so important should be done by or under the immediate supervision of those officials who have the supreme discretionary control of the corporate business. But the phrase is deceptive. It is obvious that in point of fact, if the transfer of credit from the drawer to the payee is duly made, contemporaneously with the certification, there is no possibility of any loss accruing to the bank. As well might it be said that if A. draws his check in favor of B., both being depositors in the same bank, and B. deposits it, the shifting of the credit from the one to the other is a pledge of the credit of the bank. Practically, instead of being called a pledge of credit it should be considered a transfer of credit, and should be regarded as a mere matter of book-keeping. It is true that the bank is bound by the acceptance as by a promise to pay; but it is only a promise to pay a sum actually left with it for the express purpose of being used for such payment. It is under a similar obligation to every depositor in the bank, though the ordinary depositor has no more accurate written evidence of the amount to his credit than is furnished by his bank-book. Before the acceptance the debt ran to A.; after the acceptance to B. There seems nothing very objectionable in allowing the cashier to make this change. These words therefore, if they can be regarded as describing a business operation involving risk and calling for discretion, are in fact seriously deceitful.

Even if this case could be construed, which we have tried to show that it cannot, to support the view that usage could not

confer upon an officer the power to bind the bank by certification, yet in this it would stand alone against a great weight of contrary authority. The Pennsylvania case, cited above, shows that in that State the power may be conferred and will be upheld. And though the reticence of the judges is such that they do not intimate how it should be conferred or under what circumstances it will be upheld, yet if it can be thus treated by any means, even by the most formal vote, it can also be sustained by inference resting upon proof of established usage. The New York cases are numerous and united in sustaining the authority derived from usage.[1] It would seem to be an universal custom in that State for either the cashier or the teller to certify checks. Nothing being easier than to prove this custom, it has always been done at the trial of all the causes. Thus the possibility of relying upon this and basing the decisions upon it, has brought about that in New York it has never been necessary to raise or pass upon the question of inherent power. Upon that question the New York cases are not precedents. Though if Mussey *v.* The Eagle Bank is an authority against the inherent power, it is but fair to say that the court, in giving its opinion in the case of the Farmers' and Mechanics' Bank of Kent County *v.* The Butchers' and Drovers' Bank, subjected the Massachusetts decision to a very severe criticism, and left very little doubt that, if the absence of proof of custom had driven them to the necessity, they would have been inclined to sustain the position of inherency. It must be concluded that in sustaining the validity of the custom the New York cases are unquestionably correct.

Which of the three officers, president, cashier, or teller, is the proper one to certify a check, and whether any one of them enjoys the power to the exclusion of the others, are matters of

[1] Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 16 N. Y. 125; Meads *v.* Merchants' Bank, 25 id. 143; Clarke National Bank *v.* Bank of Albion, 52 Barb. 592; Willets *v.* The Phœnix Bank, 2 Duer, 121; and the New York cases cited in the remainder of this chapter.

minor importance. The bank, if it proposes to allow any of them to do so, should make its own selection, based upon the personal traits or the superior facilities for accuracy, in the one or the other. But whoever of the three is authorized, either directly by vote or instructions, or indirectly by tacit approval and usage, will be able to bind the bank. It is consistent with the nature of the office of each. The question would chiefly arise where the usage is not that of a single institution, but the general usage of the banks in any city is adduced to prove implied authority. This portion of the question admits of no certain answer, and is more properly discussed under the head of "Custom and Usage." Judge Selden regards the teller as the more proper officer, on the ground that of course the cashier *could* certify, but that the teller's office is an offshoot of the cashier's, and has appropriated that peculiar description of duties, which render it more *convenient* for the teller to assume this function also.[1] But as matter of law, no choice, or varying degree of legality, is recognized between them.

A bank, which allows an officer to certify checks, can of course impose upon his authority any restrictions it may choose. As usual, these restrictions will always be valid as between the officer and the bank. But if it should be decided that the power of certification is inherent in any special officer, or if local usage should be such that he is to be regarded as held out to the world as possessing the general power of certification subject to no unusual limitations, notice of the existence of such must be brought home to the knowledge of any third persons who are to be affected by them.[2] One limitation however the law lays down in all cases: A cashier cannot certify the check of a drawer who has not unencumbered funds in the bank sufficient to meet the check. Any person having notice

[1] Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, *supra;* Irving Bank *v.* Wetherald, 36 N. Y. 385.

[2] Clarke National Bank *v.* Bank of Albion, 52 Barb. 592.

of the fact that the bank had not enough of the drawer's funds on hand to meet the check at the time of certification, will be presumed to know that the act was unauthorized and void, and will not be allowed to hold the bank liable upon it. But any outside party is authorized in accepting the representation of the officer as to the sufficiency of the drawer's credit, or in assuming without special inquiry that all is right solely on the strength of the undertaking itself. Knowledge that the agent cannot certify without funds is not knowledge that there are no funds. This is an extrinsic matter. A certification accepted on the faith of the cashier's or teller's statement that he was authorized to certify would not bind the bank if he was not so authorized. But his statement that there are the requisite funds in the bank is of a different nature, and will bind the bank. In general terms it may be said that where one dealing with an agent ascertains that the agent's act corresponds exactly with the terms of the power, he may take the agent's representation as to any extrinsic fact, peculiarly within the agent's knowledge, and not ascertainable by a comparison of the power with the act done under it.[1]

An officer, though authorized to certify generally, yet cannot legally certify his own checks. Apparently the rule covers equally cases where he has and where he has not money to the designated amount standing to his credit in the bank. The principles laid down, *ante*, p. 186, seem sufficiently to sustain this position. But if his certification is false, we have the authority of a thoroughly-considered case for saying that it is utterly void as against the bank. The cause of Claflin *v.* The Farmers' and Citizens' Bank turned upon the validity of the president's false certification of his own check, in the hands of a *bona fide* holder for value. In the Supreme Court it was not denied that the act was wrongful and unauthorized as between the bank and the president. But it was said that the mere identity of name between the president and the drawer was

[1] Farmers' & Mechanics' Bank, &c. *v.* Butchers' & Drovers' Bank, *supra.*

not alone sufficient to charge the holder with notice that they were one and the same person; and there being no other proof of such notice, the bank was declared liable. But in the Court of Appeals this ingenious evasion of the wholesome rule was rejected. The notice of the president's attempt to use his official character for his private benefit was regarded as sufficient to put every one to whom it came upon inquiry; and indeed it may be suggested that there was not alone identity in name, but the similarity of handwriting in the two signatures ought also to have been taken into consideration. In a final and very satisfactory decision the bank was declared not to be bound by the acceptance.[1]

[1] Claflin v. Farmers' & Citizens' Bank, 36 Barb. 540 (Supreme Court), overruled in 25 N. Y. 298 (Court of Appeals).

CHAPTER IV.

OFFICIAL BONDS.

THE custom of requiring bonds from the various officers may probably be considered as universal among banking institutions. Usually they are taken only from the executive officers; most frequently from the cashier and tellers, sometimes from the book-keepers; and, there are instances, though these are comparatively rare, in which they have been taken even from the president and directors. The questions which have arisen in litigation upon these bonds may be divided into three classes, to wit: —

I. Where it is denied that the particular act, which constituted the default of the officer, was of such a description as to be covered by the language of the bond setting forth the peculiar species of misconduct insured against.

II. Where it is doubted how long the liability of the sureties should be construed to continue, and therefore whether the default fell within the period of their liability.

III. Whether the bond can be avoided on the ground that it did not conform to the requirements of the charter or of the general organic law, under which the institution came into existence.

A very few cases remain to be added, which cannot properly find a place in any system of classification; sporadic cases, as it were, in which fraud or other illegality, charged to have been attendant upon the execution of the bond, are adduced as cause for invalidating it.

Phraseology of the Bond.

Of course considerable variety is found to exist in the form and language of the bonds used by different corporations, and especially in those portions wherein is described the species of good and satisfactory conduct which is insured. Very commonly only general phraseology is used. It is stipulated simply that the officer shall "well and faithfully," or "faithfully," or "well and truly," discharge and perform his duties. Practically it may be considered that these phrases are equivalent each to either of the others. For though a finical linguist might seek to draw some delicate distinction between the signification of the word "well" on the one side, and the words "faithfully" and "truly" on the other, and to assert that "well" means something other than is intended by either "faithfully" or "truly," yet such over-nicety is not encouraged by the law which has been laid down in the premises; and it is safe to say that these three adverbs, or their corresponding adjectives, may be used interchangeably. The better rule of construction, which is to be applied to all alike, seems to be that they are designed not only to guaranty honesty and obedience, but also reasonable skill, competence, and diligence. The reason for taking the bond is by no means limited to the narrow object of protecting the banking-house only against loss arising from embezzlement or other species of criminal conversion and misappropriation, but also against the equally probable and equally mischievous danger of carelessness, thoughtlessness, and ignorance.[1] The security for the "faithful discharge" of duties would be rendered "utterly illusory," if its import were to be narrowed to a guaranty against personal frauds only. Duties performed negligently and unskilfully, or violated from want of capacity or want of care, can never be said to be "well and truly" executed.[2] In Massachusetts a

[1] Rogers *v.* Kelly, 2 Camp. 123.
[2] Minor *v.* Mechanics' Bank, 1 Pet. 46.

bond calling only for "faithful" performance was declared to bind the obligors not only for the honesty of the officer but also for his "faithful execution of the duties of his office, which embraces competent skill and due diligence."[1] It must be considered certainly that these two cases, one of which was decided in the highest tribunal in the land, establish the correct rule of law. Yet in New York there is a well-known cause in which precisely the opposite doctrine was laid down. The bond of a teller was conditioned that he should "well and faithfully perform the duties," &c. The court declared that this was security solely for his honesty in his trust and not for his competency.[2] Yet it is very curious to note that though the conflict between the abstract statement of law in New York and in Massachusetts could not well be more direct and apparently irreconcilable, nevertheless both courts, having substantially like facts to deal with, might not improbably come to very nearly the same practical results. In New York it was said that an over-payment by mistake, honestly made, was a matter of incompetency, and was not insured against in the bond. In Massachusetts it was an obvious inference from the language of the court that if the fact was that the deficiency was caused by an over-payment made honestly and through a simple mistake, then evidence that experienced and able tellers were liable occasionally to make such mistakes, would have been admitted for the purpose of showing that at least this fact did not of itself suffice to prove incompetence. It is not to be supposed that ample evidence of this description could ever be found inaccessible. Whence it might not improbably occur that upon diametrically opposite doctrinal bases, the same conclusion of acquitting the sureties might be arrived at.

If the two above-cited decisions are the only ones which directly and in terms run counter to the New York decision, there is yet a decision in the Pennsylvanian Reports which fails

[1] American Bank v. Adams, 12 Pick. 808.
[2] Union Bank v. Clossey, 10 Johns. 271; 11 id. 182.

to do so only because it goes much farther, though in the same direction, than either the Supreme Court of the United States or the bench of Massachusetts. In this case the bond was conditioned that "J. B., the cashier, shall well and truly perform the duties of cashier of the bank aforesaid, *to the best of his abilities*." The italicized words certainly ought to have sufficed to exclude from the operation of the guaranty acts of simple incompetency or ignorance, if any language short of an exclusion in terms could do so. The defendant's counsel argued thus, and urged that the insurance of the bond was restricted to the cashier's fidelity and honesty; the degree of his ability might be considered as expressly exempted, provided his best ability, such as it might prove to be, was uniformly used. Certainly these arguments were not devoid of force. The court complimented them as ingenious, but declared them unsound. The opinion held, substantially, that the covenant was, that the cashier should discharge the duties of his appointment: — that is to say, that he should do so with competent skill and ability. One who accepts an office or trust of any kind contracts to execute it with competent skill and ability; his sureties, who are bound that he shall execute it according to his skill and ability, warrant for the performance of this contract of the officer. His undertaking is to act according to the duties of his station. So if by his act, of honest intention but in excess of his authority, the bank suffers a loss it must be reimbursed by the obligors in the above bond.[1] This is subtle, and we confess that it seems to us hardly logical, reasoning. It proceeds on the basis of what it is supposed that such a bond would naturally be designed to contain, rather than upon the basis of what it really does contain. There is a little confusion, moreover, between the undertaking of the cashier implied by his entry into office, and that of the sureties actually expressed in the instrument; between the liability of the cashier at common law, and that which exists under and

[1] Barrington *v.* Bank of Washington, 14 Serg. & R. 405.

by virtue of the stipulations of the bond. It is true that the cashier by the acceptance of the trust impliedly contracts to exercise it with due skill and ability; but it is *by the acceptance of the trust*, strictly and literally, and not at all by the execution of the bond, that he thus contracts. It is possible that his acceptance of office may place him under obligations greater than those named in his bond, and so apparently it does in this case. But to say that the sureties in the bond, who have defined in perfectly intelligible language the extent to which they consent to become guarantors, can have the same extended until it becomes commensurate with a liability of another person, their principal, rising from an entirely alien origin, seems to us hardly a tenable position. It is not a logical sequence but a verbal illusion to say that because the cashier, by accepting office, binds himself to use due skill in its functions, therefore his bondsmen, expressly guarantying only that he shall use skill "to the best of his abilities," impliedly assume and guaranty that the skill thus described is due skill. This is to read their contract by the light of his; to embody his individual and implied undertaking arising from his individual act into their specifically-worded and independent undertaking; to substitute the measure which a legal implication applies to his contract for skill in place of the measure which they in their contract have taken pains to provide in exact phraseology. But though the original soundness of this opinion may be thus criticised, yet it must be acknowledged to be the law. It has stood for long years unchallenged, and perhaps it would now be foolish to change it. It teaches one practical precaution: that no general form of words in a bank-officer's bond can be relied upon as sufficient to restrict the guaranty of the bondsmen to the mere personal honesty and integrity of the officer unless these words, or their plain equivalents, are distinctly used and are stated to constitute the limits of the intended insurance.

But though an over-payment by mistake may be set up, and often successfully, in defence to a suit upon a bond, it is neces-

sary that the officer should have acted honestly not only in the transaction of over-payment, but equally in reference to all matters which, however remotely, concern it, or are connected with it. If he subsequently commits any deceit or fraud, or makes false entries in the books, for the purpose of concealing the deficiency, his dishonest dealing in this particular will suffice in the eye of the law to give the coloring of guilt to the entire affair from the very outset. It may still remain true that the actual loss of the money was caused wholly and solely by the innocent over-payment; and that the subsequent misconduct could not aggravate the injury, as subsequent good conduct could not have remedied it. Still the acts resorted to for securing concealment are a *suggestio falsi;* the concealment itself is a *suppressio veri.* Each is an unfaithfulness and will, as a rule, be assumed to have contributed to the injury suffered by the bank.[1]

If the bond, instead of insuring honesty and competency in such general terms as are displayed in the foregoing instances, enumerates specific acts in distinct language, and guaranties that the officer shall perform these acts, the peril of possible mistakes in their performance, however innocent and excusable the error may be, is assumed by the obligors. A deliberate undertaking, for example, that the cashier shall "deliver to his successor in office . . . all moneys, securities, stocks," &c., &c., is an absolute and unconditional guaranty for such delivery, and the fact of an innocent loss growing out of an excusable mistake cannot be availed of in defence to a suit for non-delivery.[2]

But a loss of moneys or securities by reason of a theft or robbery, accomplished without the collusion of the officer, and not furthered or rendered possible by his negligence or incompetence, would be a good defence to a suit upon a bond written in any of the forms heretofore described.[3] The bondsmen are

[1] Union Bank *v.* Clossey, 11 Johns. 182; Rochester City Bank *v.* Elwood, 21 N. Y. 88.

[2] State Bank *v.* Chetwood, 8 Halst. 1.

[3] Allison *v.* Farmers' Bank, 6 Rand. 204; American Bank *v.* Adams, 12 Pick. 303; Planters' & Merchants' Bank *v.* Hill, 1 Stew. 201.

certainly not insurers against the acts of any person save the principal in the bond.

Where the bond is inartificially and clumsily drawn, so that the careless collocation of inconsistent words would lead to absurdities if a literal construction were attempted, the court will revise and correct the language so as to render it conformable to reason.[1] The phraseology of the bond, upon which the litigation in the cited case arose, furnishes a fair example of the method of application of this rule. The condition of the bond was that the cashier should "with fidelity, punctuality, and attention, to the best of his skill, judgment, and ability, conduct himself in said office well and truly, discharging all its duties, executing the orders of the directors of said bank, safely and securely keeping all moneys deposited in his hands," and doing a great multiplicity of other "duties, acts, and things," "all and singularly," according to the descriptions contained in several more adjectives and adverbs. The writer of the bond was evidently floundering in a sea of words, and the court was obliged to come gallantly to the rescue. They declared that it was evident from the very nature of the language, that it was not intended to apply all the restrictions to each particular duty; but that an intelligent apportionment should be made of the various expressions among the divers "duties, acts, or things" respectively, as from their several natures they might be susceptible of the qualifications mentioned. Thus "punctuality" could hardly be called for in "keeping" but rather in "accounting for" or "paying over" money. On the other hand "judgment and ability" might be required in "keeping" and "skill" in "accounting," but neither of these qualities could be of much assistance in the business of "paying over." The surety will never be held to guaranty the performance of the duties of a public office in a manner either absurd or impossible simply because an awkwardly phrased

[1] Planters' & Merchants' Bank v. Hill, 1 Stew. 201.

bond would subject them to this obligation if an effort were made to construe it strictly according to its wording.

Evidence.

In a suit to recover a deficiency in money, or the value of securities which ought to be but are not forthcoming, it is sufficient for the bank in the first instance to allege and prove that they came into the hands and possession of the officer, and have not since been returned or accounted for by him. These facts, laid in the declaration and satisfactorily established on the trial, suffice to create a presumption that the missing property has been wasted or misappropriated by the officer. If the deficiency is in the money, or uninvested funds of the bank, it is not necessary for the bank to declare or to prove the receipt, at certain times, of specific sums by the cashier, from individuals named, and to allege these particular sums to have been since lost or converted. Obviously this would be at once a useless and an impossible requirement. All the sums paid into the bank are usually blended into one aggregate mass, and the waste, loss, or embezzlement in the great majority of cases takes place from this. If at any time an officer should lose or embezzle the whole of any especial sum taken by him at one time from an individual, it would yet be totally impossible for the bank to assure itself of the fact. Consequently it is incumbent upon the bank to allege and prove simply that the officer has received a certain amount as a sum total, and that he has returned or accounted for a less amount, likewise as a sum total. If then the defendants seek to rebut the presumption of his liability for the difference which, unless they do so, becomes conclusive and supports a judgment against them, the burden is shifted upon them to allege and show that the deficiency occurred in some manner such as to relieve them from a liability, under the bond, to make it good. If to this end they intend to rely upon the innocent mistake of the officer, or upon

a robbery from him, either of which is a sufficient defence,[1] they must set forth the time, place, and other circumstances attendant upon the mistake or theft with such certainty, if possible, as to show that it befell while the officer was acting duly and properly in the discharge of his functions according to the ordinary rules and customs of the business. It is not sufficient for them to show simply that the explanation is a reasonable or a probable one; they must maintain it as a fact.[2] But the proof which will be required must be in accordance with the intrinsic nature of the fact itself. It would be seldom, for example, that a paying teller could show, with the certainty of demonstration, especially after the lapse of much time, that he had overpaid certain amounts on certain checks. The question would seem to be eminently fit for the decision of a jury. It should be left to them to say whether they are satisfied that there has been over-payment by innocent mistake, or a robbery without the collusion and unaided by the culpable negligence of the officer. This is precisely the species of controversy which is most satisfactorily and correctly settled by a jury's verdict. It is true, however, that in the case of the American Bank *v.* Adams, the court declared, as if it were a matter of law, that the evidence adduced was insufficient to sustain the defence of an innocent over-payment. The evidence was that the teller was considered to be honest, careful, and vigilant; that the directors had stated their belief that the loss occurred through over-payments; that they had since continued to employ the teller in duties of trust and confidence; and that similar innocent losses befell tellers so frequently that they might be regarded as inhering in the nature of the duties of the office. The court said that all this doubtless went strongly to repel the notion of want of integrity, but never-

[1] Walker *v.* British Guaranty Association, 18 Q. B. 277. Also the cases cited below in the discussion of this topic.

[2] Allison *v.* Farmers' Bank, 6 Rand. 204; Minor *v.* Mechanics' Bank, 1 Pet. 46; American Bank *v.* Adams, 12 Pick. 303; Morris Canal & Banking Co. *v.* Van Vorst, 8 Zabr. 98.

theless was not sufficient to "prove the specific mode of the loss;" the defendant must maintain his justification affirmatively. It is not to be supposed, however, that the intention of the court in delivering this opinion was to signify that the question of fact, to wit: what was the real cause of the loss? was to be taken from the forum of the jury. Their language should be rather construed as a criticism made upon the evidence offered in a certain cause, and serviceable in suggesting the instructions which may in an appropriate case be given to a jury to guide them in weighing the testimony which is before them. It is clear that though the court may declare as matter of law that the jury shall not regard proof of a probability, established by testimony of a purely general character, as equivalent to definite proof of a specific fact, yet still it must remain for the jury, in subjection of course to this rule of law, to determine whether or not that specific fact is proved to their reasonable satisfaction. So if the defendants allege innocent error or robbery, they must be allowed the ordinary right of all litigants to have what is obviously a question of fact determined by the verdict of a jury.

If the plaintiffs assert that the officer has received a certain amount which he has never accounted for, it will be proper for the defendants to deny that he has ever received the amount. This leaves the burden of proving the receipt upon the bank. But if the defendants only answer that the officer has accounted for all that he has ever received, they have the onerous task of proving the correctness of both sides of the account, and of making them balance. They in fact relieve their adversaries of nearly all that work which would otherwise have to be done in establishing a *prima facie* case. Furthermore, if they deny the receipt they may still plead excuses, if the receipt should be proved, which they could not do if they had adopted the other form of answer.[1]

[1] Exeter Bank *v.* Rogers, 6 N. H. 142.

Designation in the Bond of the Department in which the Officer is to serve.

It is commonly the case that the bond of the officer designates in some manner the department in which he is to serve. It may either state that he has been "elected the cashier," or may simply describe him as "teller," or may contract that he shall perform "the duties of the office of book-keeper;" or by some other similar form of words may recognize the general nature of the functions which he is intended to fulfil. It is obvious that these functions may be subsequently altered and enlarged by the directors, or that they may be in a measure curtailed and others substituted for them, or that the officer himself may without authority transcend them, and that having so transcended them he may, in a province not his own, unintentionally commit some blunder and thereby cause a loss to the bank, or may designedly commit a fraud or a theft. In all these cases nice questions arise as to whether the act is covered by the undertaking of the bond.

It is clear that the directors cannot materially increase the risks against which the bondsmen have consented to give their guaranty, without the assent, express or implied, of the bondsmen themselves. It has been frequently declared, however, that assent to moderate and reasonable alterations or extensions, made in the duties of officers, will be assumed by the law. The bondsmen are supposed to know that the powers of the board extend to making such changes as it may see fit in the regulations and conduct of the routine of corporate business. They are supposed to contemplate the probability, or at least the possibility, of such action intervening during the period of their liability, to affect it in some small degree, it may be slightly favorably or it may be slightly unfavorably. Within a reasonable scope they must anticipate and submit to variations thus caused. But manifestly this rule must be restrained within the limits of the practical necessities and com-

mon-sense rules of the business. Assent to any considerable increase of risk can never be implied. The *character* of the risk can never be materially altered. A book-keeper may have many more books given him to keep than he had at the time of the execution of the bond; a cashier may be deputed to act as teller; "for the office of teller is not higher than that of cashier." Such changes do not work substantial increase in the bondsmen's risk, or an increase which it can be supposed that they would have repudiated, or would have considered unlikely to occur, when they entered into the contract of insurance. The book-keeper is a book-keeper still; though he has more labor it is of the same nature; the cashier only fulfils in person the functions of a subordinate, which are strictly consistent with his own office. But to raise an assistant book-keeper to the office of teller, or to the still higher office of cashier, would be assuredly to vitiate his bond as a security for his good conduct and sufficient skill in his new position.[1] It would be absurd to take for granted that persons willing to guaranty that a man has skill and ability enough to assist in keeping books, are therefore willing to guaranty that he has skill and ability enough to be the teller or cashier of a banking corporation; equally absurd to declare it to be an implication of law that, because the same persons will guaranty his honesty in the circumstances of such moderate opportunity and temptation to fraud as he must encounter in the book-keeping, therefore they will, and in fact do, guaranty the same honesty in the

[1] Anderson *v.* Thornton, 8 Q. B. 271. See also Grant on Bankers and Banking, p. 260, and cases cited. He there lays the principle down, very soundly, that a variation, without assent of surety, which may amount to substituting a new for the old agreement, is an absolute discharge of the surety. This is sound and accords with the text, though Grant's further designation of any variation "which may prejudice" the surety ought in our view to have been rather more narrowly restricted, as by limiting it to cases of *substantial* prejudice, or to prejudice of that kind or degree that the surety could not have been reasonably expected to contemplate as a possibility when he entered into the undertaking.

face of the vastly increased opportunity and temptation held out by the duties of teller or cashier.[1]

Words are sometimes added to the effect that the officer shall perform all the "duties of the said office which may be prescribed by the directors." These words clearly enlarge rather than restrict the responsibility of the sureties, and distinctly anticipate that additional duties may be imposed during the term of the suretyship and will be included within its protection. But evidently these additional duties must be consistent with the functions of the office named; or if not consistent, they must at least be of a lower grade and a lesser risk. A teller could not be made a director, nor could a book-keeper be made a president, and still remain guarantied by this bond, by virtue of the enlarging power of this phrase.[2] Still more indefinite language is sometimes used, as where a bond insured the "faithful discharge of the duties of the office [of book-keeper] and all other duties required of him in said bank." It is probable that substantially the same rules of construction would be held to govern in this as in the preceding case; but no authorities render this certain.[3]

Next is the case where the officer deliberately transcends the allotted duties of the office named in his bond for the purpose of committing a fraud; as, for example, where a book-keeper, having given bond specifically to perform the duties of book-keeper, and having, as book-keeper, no occasion and no right to handle the money of the bank, nevertheless overstepping the ordinary routine of his functions does touch and abstract money. Though there is a conflict of judicial authority concerning the law in such a conjuncture, yet we think that little hesitation will be felt by any professional man (and certainly none whatsoever by any unprofessional man) in selecting the better principle. In Allison *v.* Farmers' Bank (cited *ante*, p. 202)

[1] Minor *v.* Mechanics' Bank, 1 Pet. 46; Rochester Bank *v.* Elwood, 21 N. Y. 88.

[2] Durkin *v.* Exchange Bank, 2 Patt. & H. 277.

[3] Planters' Bank *v.* Lamkin, R. M. Charlt. 29.

a Virginian bench held that the sureties on an accountant's bond were not liable for his theft of money from the teller's drawer, since his bond secured only his fidelity in the "office of accountant," and as accountant he was not put in possession of any money of the bank. This ruling seems thoroughly narrow and unsatisfactory, it was rendered only by a divided court, and has been deliberately overruled in New York in the case above cited, of Rochester Bank *v.* Elwood, with the true criticism that its principle, if followed, would substantially cancel all official bonds. In this latter case also the bond specifically secured the faithful discharge "of the trust reposed in [the officer] as assistant book-keeper." In this case also he embezzled funds which, in the strict performance of his duties, he had no occasion to touch, and then he made false entries in his books to conceal the fact. This last feature in the case gives rise to some remarks in the opinion not perhaps strictly bearing upon the precise point in discussion; but rather than mutilate, or give in an imperfect shape, the reasoning of the court, we shall condense the whole. The judge said that construing the instrument by the light of attendant circumstances he did not think that the bond was limited to insuring mere fidelity in the actual book-keeping. The book-keeper was in such close contact that he could easily abstract money, and more easily than any one else could conceal the abstraction by falsifying his books. These facts must be presumed to have been known to the sureties, when they guarantied his faithful performance of a trust as an employee in the bank. It cannot be fairly supposed that they intended to guaranty only that he should keep the books correctly, but rather that he should be honest and faithful in his trust as an employee of the bank. They engaged absolutely for his integrity and fidelity in the discharge of the trust of assistant book-keeper. The bond indicated the department to which he was to be assigned and guarantied that he was a trustworthy person to discharge its duties. His "faithful discharge" of the trust implies an en-

gagement that he shall not transcend it to embezzle. If he does transcend it, and uses the opportunities it affords him, for the purpose of stealing, it is not a "faithful discharge." Therefore he is liable for the abstraction, *per se*. But especially would he be liable if the false entries were concurrent and simultaneous with, and a part of, the guilty *res gestæ*. A liability which would clearly have accrued had these entries been made to enable a confederate to take the money cannot be evaded by the book-keeper's taking it himself. It is no defence that the false entries were made solely to enable him to escape detection. He used a means furnished by his agency to successfully consummate a fraud. The taking and the entries were one transaction, and it can hardly be contended that the ultimate loss of the bank was in no degree attributable to the false book-keeping and the abuse of trust as book-keeper. The falsification was parcel of the wrongful act, and this is deemed sufficient.

Indeed it seems a reasonable general rule to assert that if the officer has, in any part of the transaction, acted otherwise than in perfect honesty and good faith, excuses cannot be heard to absolve the defendants. It is impossible to split up the transaction into parts, and to say this part was the only part which actually caused the injury, and this part was honest. Such a system of legal anatomy is simply absurd. Originally it was open to the courts to declare the undertaking absolute, and to refuse to admit any explanatory matter by way of exculpation. If practical justice effected a relaxation of this possible stringency, yet it was only for the sake of protecting substantial, *bona fide* innocence, not to aid in introducing a practice of the artful secation of a complete whole into guilty and innocent components, and the referring the injury to the one or the other of these. If in any portion of the entire business there has been dishonesty this must be regarded as tainting the whole.

So it is no defence that a cashier has done a dishonest, irregu-

lar, or improper act, under the express directions of the board of directors, if he knew that their purpose in procuring the act to be done was wrongful.[1] He is bound to obey them, doubtless, and it may be that he himself would have indignantly rejected any participation in the nefarious profits of their scheme. But neither his duty of obedience, nor his private intention to keep his own hands clear from their illicit gains, are a justification or excuse for his connivance. The guilt that is in the act leavens its entirety. It seems not improbable that even if the act of the cashier were in itself strictly within the scope of his duties, the same rigid rule would apply, and his knowledge of the object with which it was ordered would make his doing it a piece of misconduct, within the protection of the bond.

Bank's Power to Ratify the Illegal Act.

In discussing the subject of the powers and duties of cashiers, it has been seen that dealings may be had with these officers under such circumstances of time and place that the bank may not be bound by them. But the bank may at any time waive the irregularity, abandon its defence, and assume the liability which the party dealing with the cashier sought to impose upon it. It has an unquestionable right to do this, if it chooses. It depends upon the choice which the bank shall make between repudiation or ratification, whether or not it can have any remedy on the official bond. If it repudiates the transaction it cannot sue upon the bond; for the reason that it has avoided all suffering. It would have no possible cause of action. But if it ratifies and adopts the transaction, the right of action for compensation for any injury consequent upon the irregularity accrues. Where a bank has to consider what line of action it shall take in such circumstances, it must be governed by its views of wise policy in the premises. If its

[1] Minor *v.* Mechanics' Bank, 1 Pet. 46.

reputation would suffer, from a rigid adherence to its rights and a more liberal conduct is deemed advantageous, it has the unquestionable right to act accordingly. It is under no obligation to the sureties in the bond to stand upon its extreme legal rights, and to narrow down their liability and watch over their interests to the sacrifice of its own. The possibility of such dilemmas occurring, and of the decision being in favor of corporate ratification, is an event which every bondsman must be assumed to contemplate as constituting an essential part of his risk. But it is evident that if, by the decision of the bank, the act does not bind it, then it can suffer no loss, however official the proceedings may have purported to be; and it is not the fact that the act purports to be official, and thereby accomplishes a fraud upon others that gives the right of action to the bank; but it is the fact that some substantial loss or measurable injury has been actually inflicted upon the bank itself, through the medium of the dishonesty or irregularity.[1]

In England, the clerk of a country banking house was sent several miles into the country, at the request of a customer of the house, to receive some money from him which he wished to place on deposit. The clerk, by accident, lost the money from his pocket on his way back. The jury found that it was not the custom of bankers in that neighborhood to send thus for their customers' funds for deposit. But the court held that the sureties could not set up in defence to a suit on the bond that the loss did not occur within the ordinary scope and functions of the clerk's official position, and so was not one for which they were responsible.[2] Grant in his work asserts that the decision would be the same in case of the payment of a check, or the receipt of money, after banking hours, or of sending a clerk to London on an emergency to obtain funds, or the like.[3] These views, however, do not conflict with the theory of the law which is laid down in the preceding paragraph.

[1] Pendleton v. Bank of Kentucky, 1 T. B. Monr. 171.

[2] Melville v. Doidge, 6 C. B. 450. [3] Grant on Bankers and Banking, p. 256.

The basis of recovery in all such cases must still be the actual loss or injury accruing to the bank because it was either absolutely liable, or because it saw fit to assume the liability, upon the acts of the servant.

The Period covered by the Obligation under the Bond.

The bond of an officer remains in force as a continuing obligation only during the period for which he legally holds office under his election. His re-election at the end of this period and his entry upon a second term of office, though no actual gap intervenes, does not operate to revive or to keep alive his bond. If the office be annual, the bond should be annually renewed. Though if the office be annual with the proviso that the incumbent shall continue to hold until a successor is appointed and qualified, and the officer continues to hold over after the expiration of the year by virtue of this clause, his bond will likewise continue in force. It is essential, however, that the office derive an annual character by force of some law or legal resolution or by-law, if the obligation of the bond is to be only of a year's duration. If the office is declared to be so by the charter, or in the organic law, or in the corporate by-laws, or perhaps even by a vote of the corporate government, it will be assumed that the sureties entered into their undertaking with a view to this established limitation upon its continuance. But we have the authority of the Massachusetts case, cited below, for the doctrine that a mere habit or usage of the directors to re-elect every year does not impart the legal character of annual duration to the office. The sureties are not supposed to have regarded a custom which has in fact no particular necessity or object, and which may at any time be broken in upon or wholly abandoned without changing the legal position of affairs in any respect. The naked fact of annual re-election therefore is not sufficient to make the obligation of the bond only annual. This rule applies to all cases in which the bond names or refers to no specific limitation of

the liability, and to all cases in which such general phrases are used as "during his continuance in office" or "so long as he shall be" cashier, teller, &c. Of course if the bond distinctly declares its own duration, this is conclusive upon the question.[1] Where the charter prescribes an annual election of directors, and that the "directors for the time being shall have power to appoint a cashier," the tenure of office of the cashier is not thereby rendered annual. But having been once duly appointed, by a vote containing no express limitation, he will continue to hold office by virtue of this original appointment, either until the expiration of the charter, or until his removal before that time by the directors.[2]

A similar rule was laid down in the case of the Amherst Bank *v.* Root, to the very clear and satisfactory opinion in which, delivered by Chief Justice Shaw, we have frequent occasion to refer in this chapter.[3] The statute provided that the cashier should retain his place until removed therefrom, or until another should be appointed in his stead. In 1831 a cashier was appointed and gave bond; in 1832 he was re-appointed and gave no new bond. He continued in office several consecutive years, and in 1836–7 was guilty of defaults. His two appointments were each expressed, on the records, to be "for the year ensuing." The portion of the opinion which we have occasion to rely upon at present is substantially as follows: This statutory provision governs the tenure by which the cashier holds office, which is "until another is appointed." If he is to hold the office, he is also to perform the official

[1] Welch *v.* Seymour, 28 Conn. 387; State Treasurer *v.* Mann, 34 Vt. 371; Dedham Bank *v.* Chickering, 3 Pick. 335. See also Boston Hat Manufactory *v.* Messinger, 2 id. 223, and the authorities therein cited and discussed. But it should be remarked that Dedham Bank *v.* Chickering, though not overruled, was yet declared to be of questionable soundness, in Johnson *v.* Frankfort Bank, 23 Me. 322.

[2] Union Bank *v.* Ridgely, 1 Har. & G. 413.

[3] 2 Met. 522; it should be noted that Judge Dewey delivered a dissenting opinion in this cause; but it appears wholly unconvincing when compared with that of his distinguished brother justice.

duties, and a bond that he shall faithfully perform the duties, will "include duties performed after the limited time for which he is chosen, and during the time that the office is continued by force and operation of law." Though the election was expressed to be for the year next ensuing, yet the office not being by law annual, he held it by force of the general law until another should be appointed in his stead. That the directors hold by virtue of an annual election has no effect in controlling the positive provision of the law concerning the cashier's tenure of office. A plausible argument is that the fact of an annual election is evidence of a by-law or usage making the office annual. But the directors are supposed to know the general law, which declares that the cashier shall continue in office till they remove him. Their re-election, therefore, amounts only to the fact that they wish to give expression to their will that he should remain. His election to an office which he already holds, and would continue to hold without an election, is only a manifestation of their intent that he should continue to hold. That they themselves regard it thus, as a continuance of an existing office, not the commencement of a new one, is obvious from their requiring no bonds. "The cases where it has been held, that the generality of the words of an obligation may be restrained and modified are of two classes. 1. When there is a preamble or recital, stating directly or by implication the intent and purpose of the parties to the bond; or 2, where it is a stipulation for fidelity in office, and it appears by the nature of the constitution of the office that it was limited to a particular time." In the present case the words are general; there is no recital; the office itself is not annual. That the election was "for the year ensuing" is answered by the fact that the law made the office a continuing one until the incumbent was removed, and another chosen in his place; which did not happen till after the occurrence of the breaches assigned.

If no other legal limitation can be annexed to the term of office, it seems that at least the duration of the charter, or the

period for which the corporation may exist under the law of its organization, must be the utmost time over which the bondsmen's liability can be extended. A renewal of the charter or extension of the period of existence cannot operate to carry the obligation over to hold good during this second lease of the corporate life. The soundness of this principle seems so obvious that it is surprising to find that the opposite rule has been laid down in a case decided in New Hampshire.[1] It is impossible, however, to allow that this decision throws any doubt upon the asserted principle which must be regarded as established by a greater weight of authority, as well as supported by a much more satisfactory chain of reasoning.[2] Indeed the case cited from the Pennsylvania Reports goes much further, and declares that the revival of the charter after a forfeiture had been legally consummated by the default of the cashier will not operate to revive the obligation of the sureties on his bond. This ruling is based upon the principle above declared, which is mentioned as if it were an axiom which could never be doubted. The sureties had a right to contemplate and must be supposed to contemplate a possible forfeiture as a possible limitation of the liability. That they regarded this liability as commensurate only with the original charter is clear, "for no one will contend that an extension of charter would have operated as a correspondent extension of the security. Such an extension . . . would, in fact and in law, be a new creation." That view of the law which the bench of Pennsylvania regarded as so self-evident that they used it as a starting-point for an argument which carried them much further in the same direction, will hardly be destroyed by the very unsatisfactory reasoning of the Connecticut opinion. It should be noted, however, in citing and relying upon this Pennsylvania case,

[1] Exeter Bank v. Rogers, 7 N. H. 21.

[2] Bank of Washington v. Barrington, 2 Penn. 27; Thompson v. Young, 2 Ham. 334. In this case an immense array of authorities was collected by the counsel for the bondsmen, which was well pronounced by the court to be "conclusive." Union Bank v. Ridgely, 1 Har. & Gil. 418.

that the forfeiture was already absolute and complete when the legislature came to the rescue and declared that it should again come into existence, ratifying the acts which had been done in the interval; and the court are careful to state that they have not to pass upon a case where the legislature had intervened to prevent the consummation of an only inchoate forfeiture.

That both the officer and the corporate government have, in fact, supposed, or have conducted themselves so that it must be assumed that they supposed, that the bond was still continuing in force after it had, in fact, been terminated in any of the ways above described, does not affect its validity, or operate as a waiver of its determination. The misapprehension, being common to both parties, does not prevent either from standing upon his original rights.[1]

When an officer has given a bond in which no express limitation of time is set to the duration of the obligation, if afterwards, at the close of a year or other term of his incumbency, he is again appointed, again qualifies and gives a new bond, the old appointment is thereby terminated,—the obligation of the old bond ceases, and no recovery can be had against its obligors by reason of his subsequent default.[2] But if there is a special proviso in the second bond that it shall not impair the obligation of any previous bond until the same shall have been given up and cancelled, all the bonds will still be legally valid, and will be equally available as security against breaches until such cancellation of the earlier ones actually takes place.[3]

It has sometimes happened that an officer, being reappointed for a second term of office and giving a new bond for the new term, is at the very time of his appointment a defaulter, though the fact is unknown to all the parties save himself. If, then, after the reappointment he does any further wrongful official act in reference to the existing defalcation, though only for the

[1] Bank of Washington *v.* Barrington, 2 Penn. 27.
[2] Johnson *v.* Frankfort Bank, 23 Me. 322.
[3] Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. 171.

purpose of concealing it, and even though he may not in any manner increase its amount or alter its nature, the sureties upon the second bond will be liable. Whether or not the sureties on the first bond could also be held, either altogether instead of the sureties on the second bond, or for the purpose of making up the full amount of the loss if this could not be obtained from the sureties on the second bond, is a question upon which the only two authorities which we have are somewhat at variance. In the Indiana case, the officer misappropriated moneys received by him in his second term to make good his defalcation in the previous term, and the court held positively that *only* the sureties for the second term could be held. In the Massachusetts case the cashier had embezzled in the first term; after his reappointment he borrowed money, as cashier, and placed it in the bank to meet an examination, after which he withdrew the amount from the bank and returned it to the lenders. The court said, although a deficit existed prior to the execution of the second bond, "and which may have been covered by an antecedent bond," yet the transaction in the second term was not distinguishable from an actual payment from his own funds to make good the deficiency, and a removal afterwards of corporate funds without the assent of the government.[1] It follows from these cases that it is not necessary that the entire transaction, creating the liability, should take place within the period covered by the bond. The occurrence of any substantial part within that period is enough to make the liability attach. *A fortiori*, therefore, if the whole of the fraudulent part falls within the term of the obligation the obligors will be bound.[2]

If misconduct on the part of an officer is discovered his subsequent retention in office will operate to discharge the sureties from all liability for any breach of the bond committed by him subsequent to the discovery, a reasonable time of course being

[1] Ingraham *v.* Maine Bank, 13 Mass. 208; Cook *v.* State, 13 Ind. 154.
[2] State *v.* Van Pelt, 1 Cart. 304.

allowed for the directors to assemble and act in the premises. But if misconduct is suspected or even actually discovered, and the directors are satisfied at first only to suspend the wrong-doer temporarily from the exercise of his functions, and pass a vote to that effect, the liability of the bondsmen still continues until the suspension is actually effected. At least this is the case if there is no unnecessary or unreasonable delay in carrying the suspension into effect.[1] For though the continuance in office by the directors of an official whom they know to be dishonest and unfit for his post, may have the effect of vitiating the obligation of his bond as a security for his defaults occurring *after* the knowledge and continuance in office;[2] yet a suspension is not, in fact, a continuance in office. The directors have a right to take this step first, for the purpose of gaining time for more elaborate investigation and deliberation. If they take it with due promptitude it is enough. For the guilty party is as incompetent to do acts which will place his bondsmen under any further liability when he is suspended as when he is absolutely dismissed. But the neglect of the directors either to suspend or to remove the officer after they have become aware of his dishonesty or incompetence, will not relieve the sureties from the liability which had already accrued for breaches which had been consummated prior to the time when the directors acquired such knowledge.[3] It only annuls the bond for the future.

Statutory Bonds.

The National Banking Act, sec. 8, declares that the association "may elect or appoint directors, and by its board of direc-

[1] M'Gill *v.* Bank of the United States, 12 Wheat. 511.

[2] This doctrine is, perhaps, to be fairly implied from the language of the court in Taylor *v.* Bank of Kentucky, 2 J. J. Marsh. 568, which, however, only holds directly that the retaining an officer in office after knowledge of his default does *not* exempt the surety from liability for all defaults *prior* to the knowledge and retention. Also *arguendo* in Franklin Bank *v.* Cooper, 36 Me. 179.

[3] State Bank *v.* Chetwood, 3 Halst. 1.

tors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them, and fix the penalty thereof," &c. It is evident that this gives no right to the association to require bonds of a director, at least unless he shall also fill some other office. But this does not render the taking of a bond from a director illegal; nor does it prevent such a bond from being valid at common law. It only deprives the bond of a statutory character, which is an insignificant loss, inasmuch as it seems to be attended by no very definite practical advantage. The power to take official bonds is inherent in every corporation, independently of statutory permission; and the permission or the command to take them from any particular officers cannot be construed to preclude the power of taking them from others also.[1] Otherwise the statute gives no description concerning the terms of the bond, thereby saving the chance of considerable litigation in cases where the bond might not precisely conform to the legal requirements. Generally it may be said that any condition in the bond, consistent with its general character and not in contravention of the rules of law, of good morals, or of public policy, will be sustained. The obligation may be in any sum which the directors see fit. Though it is not probable that they would be allowed to recover any designated sum as "liquidated damages" in all cases, neither any money in the nature of vindictive or penal damages, at least from the sureties. From them the recovery should be limited to the actual amount of the loss. The bond is strictly for reimbursement, not for either punishment or profit. This character imperatively fixes the measure of damages at the amount of actual pecuniary loss or injury which the bank has sustained. The rule was thus laid down in Bank of Washington *v.* Barrington,[2] where it was also said that only the injury naturally and in the ordinary course of business arising from the misconduct could be recompensed. Remote

[1] Bank of Northern Liberties *v.* Cresson, 12 Serg. & R. 306.
[2] 2 Penn. 27.

results cannot be proved against the sureties; much less results which are in a measure due to negligence or ignorance of the directors in the events transpiring after the malfeasance.

It is now established beyond possible question that a bond may be void as a statutory bond and yet perfectly valid as a bond at common law.[1] Although both in its form and in its execution it should differ very materially from the special regulations prescribed in the charter or statute in accordance with which it purports to be drawn and executed, nevertheless as a contract voluntarily entered into, upon sufficient consideration and for a perfectly legal purpose, it remains obligatory upon the parties, independently of the statute. Where the bond differs from the statutory form only in setting forth a greater number of requisitions to be complied with by the officer, if they are severable, those of them which are not called for by the statute may be rejected as surplusage.[2] This would render the bond good under the statute, but nothing would be practically gained by it. For without the severance and rejection the bond would still have been good in its original shape at common law. The operation of this latter doctrine can be prevented only by the express legislative enactment that a bond taken in any other form shall be void. No less positive language can be substituted for this explicit declaration with the like effect. The words used may amount to a prohibition against the officer's entering upon the discharge of his office until he has given such a bond. Still the bond in the different shape will remain good. It was urged in the case cited from the Massachusetts Reports that the bank could not recover because they could not make out their case except by proving and

[1] Bank of Brighton v. Smith, 5 Allen, 413; Bank of Northern Liberties v. Cresson, 12 Serg. & R. 306; Franklin Bank v Cooper, 36 Me. 179; Gathwright v. Callaway County, 10 Mis. 663; The Governor v. Allen, 8 Humphr. 176; State Bank v. Locke, 4 Dev. 529; Bank of Carlyle v. Hopkins, 1 Monr. 245; Morse v. Hodsdon, 5 Mass. 314; Burroughs v. Lowder, 8 id. 373; Sweetser v. Hay, 2 Gray, 49.

[2] Shunk v. Miller, 5 Barr, 250; Walker v. Chapman, 22 Ala. 116; Woods v. State, 10 Mis. 698.

relying upon an illegal act. But the court very clearly showed the fallacy of this argument, even assuming that the statute was to be construed as a prohibition on the bank-directors, restraining them from permitting the cashier to act as such till he had given the prescribed bond. Still the bank proved no illegal act or omission to support their case. In the taking of the bond in question there was no violation of law. The only possible fault lay in the omission to take another bond. But the omission to do something else does not necessarily vitiate that which was done. The bond taken was not prohibited by statute; both might have been legally taken, and both or either must be valid.

Of course the directors may render themselves liable to the bank for neglect of their duty in failing to comply with the law. If any mischief results to the corporation by reason of their failure to take the bond required by law, they may be held responsible for it as they may for the injury caused by any other misfeasance in office.[1] But this is a question lying wholly between themselves and the corporation. It has nothing whatsoever to do with the matter of the validity of the bond.

Frequently the statutes or charter will further require the official bond to be "accepted" or "approved" by the directors, or "by vote of the directors." It is obvious that this would be merely a proper duty of the board, even in the absence of the statutory direction. The form of the bond and the sufficiency of the sureties offered upon it ought of course to be considered and passed upon by the responsible government. But where an express legislative command is laid upon them to do so, it has occasionally been set up in defence to suits upon bonds, either that the directors had not "accepted" at all, or had not accepted "by vote;" or that there is no proper and admissible evidence of their having done so. This ground was first taken in the case of the Bank of the United States *v.* Dandridge.[2] At

[1] Bank of Northern Liberties *v.* Cresson, 12 Serg. & R. 306.
[2] 12 Wheat. 64.

the trial of that cause the plaintiffs undertook to prove that the bond on which they sued fulfilled the requisitions of the charter, — that it should be "to the satisfaction of the directors," — by offering in evidence the fact of its being in their possession, and by other such presumptive evidence as would suffice to raise the legal presumption if the bank had been an individual. The defendants objected that this evidence was inadmissible, or even if admissible would not be sufficient; that corporate acts must be proved by corporate records and minutes of proceedings, and since these were altogether silent on the subject of the bond, its acceptance and approval, as required by the law, must be conclusively assumed never to have taken place, and could not be shown by other and parol testimony. When the case was tried before Chief Justice Marshall in the Circuit Court he adopted the views of the defendants' counsel; but when it came before the full bench, they reversed his decision. A long opinion, intended to be exhaustive, was delivered by Judge Story, to the effect that the acceptance and approval might be proved by testimony *dehors* the corporate records, and might be presumed in favor of the bank as matter of law from proof of the same facts which would suffice to raise the same legal presumption in favor of an individual. Chief Justice Marshall, adhering to his original views, delivered a dissenting opinion. But the decision of the associate justices of course settled the law.

While the case was pending, after the ruling in the Circuit Court and before its reversal had been pronounced, a like case came before the Supreme Court of Massachusetts. The records of the bank however showed in this case, that: J. S. B. and W. D. "be accepted as sufficient sureties in a bond *to be given* by the cashier," &c. Chief Justice Parker delivered the opinion. He expressed surprise at the ruling of Chief Justice Marshall in the Circuit Court, above stated; saying, "We should have supposed that in the case, as well of a corporation as of an individual, a paper intended for their benefit and found on their

files, would be considered as having been accepted by them." But without touching this principle, in this cause, "the vote to accept the sureties, and the bond's being in the possession of the president, are a sufficient acceptance of the bond."[1] Several years afterwards the same court again held that parol evidence was admissible to show that the bond had been laid before the directors and that they had expressed themselves satisfied with it, and that this was in law equivalent to a formal acceptance.[2] The same doctrine was maintained to its full extent in Maryland.[3] It can no longer be considered to be open to question. The fact of the possession by the bank of a bond in due form, legally executed, and complete in every respect, is evidence which will alone suffice to authorize a suit upon it as having been delivered and accepted with all requisite formality.

Alleged Illegality attendant upon the Original Undertaking.

We come now to the third class of cases, wherein some illegality in the undertaking itself, or in the circumstances attendant upon its inception, are relied upon to invalidate it. The first question which presents itself is, whether a director can be a surety upon the bond of any officer of his own bank. In some States this has been forbidden by legislative enactment. But it is not thus forbidden by the National Banking Act; and when not forbidden by statute it cannot be said to be absolutely illegal. The law and the morality are both so very neatly put by Chief Justice Shaw that we are tempted to give his own words: "The next exception is, that the bond was void, as against the policy of the law, because three of the directors, whose duty it was to examine and approve the cashier's bond, were themselves his sureties. This exception certainly comes with a very bad grace from those directors who thus

[1] Dedham Bank v. Chickering, 3 Pick. 335.
[2] Amherst Bank v. Root, 2 Met. 522.
[3] Union Bank v. Ridgely, 1 Har. & G. 324.

became sureties. It sets up the dereliction of their duties as directors, to avoid their obligation as contractors. It may have been in very bad taste, it may have been very indiscreet and ill-judged, to put themselves in a situation to express an opinion on their own sufficiency as such sureties. But whether right or wrong, it is impossible to perceive how the obligors, either such directors themselves, or their co-obligors, can avail themselves of this circumstance to avoid their obligation. Another objection . . . was, that if directors, so being sureties on the deed, could approve or accept the deed, it was in effect a contract with themselves, and of no binding effect. . . . Here the corporation is an artificial person in law, distinct from all the individuals composing it, capable of contracting and bringing suits, and may contract with its own members, or have suits against them, as well as against any other persons."[1]

In Maine the State banking law provided that the bond should not be "signed" by a director. But on the ground that the bond was not operative or valid till it had been accepted it was held that if the signer was, at the time of signature, a director, but had ceased to be so at the time of acceptance, there was no violation of the statute.[2] It was held in another case that the same law would invalidate an obligation, and a mortgage-security accompanying it, given by a director to third parties to indemnify them against loss as sureties upon an official bond, the object being to induce them to become such sureties.[3]

In dealing with the parties who propose to become sureties upon an officer's bond, the directors are held to perfect good faith. The sureties, unless they are informed to the contrary, have a right to suppose that their undertaking is in the ordinary course of business, similar in all material respects to other like undertakings, and exposing them to no peculiar and hidden risks. If the directors are aware of secret facts which do in truth materially affect and enhance the danger of

[1] Amherst Bank v. Root, 2 Met. 522.

[2] Franklin Bank v. Cooper, 36 Me. 179. [3] Jose v. Hewett, 50 Me. 248.

the obligation, it is their duty, if they have an opportunity, to state the fact to the bondsmen before the delivery of the instrument. It is not enough that they take no positive pains to conceal the truth, and that they answer honestly such questions as the bondsmen put to them. They are bound to give the information, if they have a natural and proper opportunity for doing so. But they are not bound to state facts which only *may* make the risk somewhat greater in the particular case than in some other cases. It is facts which they know actually have made it greater. To illustrate the distinction: If an officer already in their service is re-elected, they are not bound to state to his sureties, offered upon his new bond, that he is careless, negligent, stupid, or a poor and inaccurate accountant. They are not obliged to state that they themselves have been remiss in examining into the condition of the bank, the amount of its funds on hand, and the correctness of its accounts. Neither need they state the existence of other and prior bonds, even though they may be still in force. But if they know that there is in fact a defalcation existing which will be covered by the terms of the proposed bond they are bound to state it, and their failure to do so is such a breach of good faith on their part as will invalidate the contract. Even where a party offered as bondsman had been a director in the bank itself at the time the defalcation took place, and ought therefore from the nature of his official duty to have been aware of it, it was held that the obligation of his bond could not be enforced against him, if he should show that as matter of fact he did not know of it; that his co-directors had carefully concealed it from him up to and after the time of his executing the bond, and apparently with the very object of leading him to execute a bond which would by its terms cover it. But the practice of any such fraud by the directors does not invalidate the instrument as a whole; it simply annuls and avoids the liability of the individual surety towards whom the fraud was practised. The co-sureties,

with whom the dealings were strictly in good faith, remain bound.[1]

Miscellaneous Points.

A bond running to the president and directors without addition of the corporate name, will be regarded as a valid bond to the corporation, and may be sued by the corporation proper.[2]

If after an official bond is duly signed, executed, and delivered to the proper officer by the principal and the sureties, it is found that the blanks in the body of the instrument, which were left for the names of the sureties, have been accidentally left unfilled, the bank has authority to insert the names.[3]

The fact that the officer did not take the oath of office, which was required by statute prior to entering upon the exercise of his functions, does not operate to vitiate his bond. Being one of the duties prescribed for him to do, his neglect to do it may be a breach of the condition of the bond.[4]

If an officer converts bills, notes, or other species of the promises to pay of the bank, on which it legally owes money, recovery upon the bond may be had for the full nominal value. The defendants cannot avail themselves of any depreciation in the marketable value of the converted paper or securities.[5] This is the only exception, if indeed even this must necessarily be regarded as such, to the general rule, that the bank can recover only the amount of its real and actual loss.[6]

Pleadings, Practice, and Evidence.

The precaution which should be observed by defendants in a suit wherein the plaintiffs seek to recover the amount of an

[1] Franklin Bank v. Cooper, 36 Me. 179; 39 id. 542; Franklin Bank v. Stevens, 39 id. 532; Smith v. Bank of Scotland, 1 Dow Parl. R. 294.

[2] Pendleton v. Bank of Kentucky, 1 T. B. Monr. 171.

[3] Hultz v. Commonwealth, 3 Grant, 61. [4] State Bank v. Chetwood, 3 Halst. 1.

[5] Pendleton v. Bank of Kentucky, 1 T. B. Monr. 171.

[6] Bank of Washington v. Barrington, 2 Penn. 27.

alleged deficit has already been noticed (p. 206). A few more points deserve mention.

In suits for breach by the officer of the condition of his bond, it is sufficient to aver non-performance in the words of the bond. The specific acts relied on as constituting the breach and sustaining the allegation of it may be made when required at a later stage in the proceedings.[1]

The defendants cannot deny the contents of the bond, set out in or made a part of the plaintiff's declaration, after they have admitted by their plea its execution, delivery, and approval. So if the bond recites that the principal is cashier, &c., or describes or designates him as cashier, &c., a surety, who has recited the whole bond in his pleadings, cannot thereafter deny the fact that the principal really filled the office which was thus stated or designated in it.[2]

It has been declared in general terms in California, though not in a banking case, that official bonds are joint and several.[3] In fact, the bond may be made either joint or several or both, by its own phraseology. The California decision can only be regarded as intimating that the tendency of the courts, in all cases where the language is doubtful or reasonably admits of the construction, is to regard such undertakings as joint and several. Where this is the sound construction the bank may either sue any one of the parties singly, or it may sue them all together. But it cannot sue any intermediate number. Its option is strictly confined to a suit against one only or against the whole. Though if it neglects this rule and does sue more than one party and less than all, the defendants can only take advantage of the error by a plea in abatement; they will waive it by a plea to the merits.[4] Where a bond is given by a principal in a certain sum, and by two sureties in a much lesser sum

[1] Pendleton v. Bank of Kentucky, *supra;* Chetwood, at the suit of the President, &c., of the State Bank, 2 Halst. 32.

[2] Milburn v. State of Maryland, 1 Md. 1; State Bank v. Chetwood, 8 Halst. 1.

[3] People v. Jenkins, 17 Cal. 500.

[4] Minor v. Mechanics' Bank, 1 Pet. 46.

each, the obligation of the sureties is several; either one of them may be sued singly, and recovery may be had from him to the full amount of said lesser sum, provided this is not greater than the amount of the loss or injury sustained.[1]

Answer by defendants that the officer had made and executed his promissory note in full satisfaction, and that it had been accepted and received in full satisfaction, was held to be sufficiently met by a denial only of the making and executing.[2]

Where the obligation of the officer and his sureties is joint, and they are jointly sued thereon, the admissions and declarations of the officer are admissible in evidence against all the defendants alike. But the language in the American case cited points directly to the important qualification that this joint character of the obligation and of the suit must be taken to be essential to the operation of the rule; and that if the undertaking of the surety were a separate and independent one, and probably even where it was joint and several and he alone was sued upon it, precisely the opposite doctrine would obtain.[3] This view of the law is hardly sustained by the Kentucky case cited; and Grant says that the English principle is, that "whatever is evidence available against the principal is available against the surety." But though he makes this statement so broadly he cites no authority which sustains it to quite its full extent. The case which he gives declares simply that in a suit against the surety after the death of the principal, entries by the latter, in his official books, of receipts of money, were evidence in behalf of the bank that these sums had been received, since the bond itself also guarantied the faithful keeping by the same officer of these very books.[4]

It cannot be set up in defence to a suit upon a bond that the

[1] Stetson v. City Bank, 12 Ohio St. 577.

[2] Morris Canal & Banking Co. v. Van Vorst, 8 Zabr. 98.

[3] Amherst Bank v. Root, 2 Met. 522; Pendleton v. Bank of Kentucky, 1 T. B. Monr. 171.

[4] Grant on Bankers and Banking, p. 257; citing Whitnash v. George, 8 Barn. & C. 556.

bank commenced operations in a manner contrary to its charter; neither that it has failed to perform its public duties in redeeming its circulating notes. Such matter cannot be introduced thus indirectly, neither is it available for the purpose of absolving a debtor from his liability.[1]

Two or three English cases should be noticed in this connection before dismissing the subject.

A clerk who had fraudulently misappropriated considerable sums, died before discovery, leaving considerable personalty and no will. His widow deposited the personalty with the banking-house and took out letters of administration. She then sought to recover the personalty, which the bankers sought to retain. She sued them, and they filed a bill against her asking for an injunction and for leave to administer on the estate. It was held to be no answer to the bill to reply that it alleged a felony and that no civil remedy lay in respect thereof.[2]

The father of a banker's clerk transferred stock into the name of the banker, in order to cover defalcations of his son. Held, that this was a composition of a felony to prevent a prosecution. *Semble*, that the father could not recover the value of the stock nor obtain an order for its transfer back to himself.[3]

A clerk, who had embezzled, prior to conviction deposited with the banking-house certain title-deeds which he possessed and transferred to them some policies of insurance upon his life, as security, so far as they would go, for the money taken. The bankers however thereafter pushed the prosecution to conviction. The court said that the amount which the clerk had embezzled was a debt owing from him to his employers; that it constituted a good and sufficient consideration for his

[1] Hughes v. Bank of Somerset, 5 Litt. 45.
[2] Wickham v. Gatrill, 2 Sm. & G. 353.
[3] Claridge v. Hoare, 14 Ves. Jun. 59.

transfer to them of the aforesaid securities; and that they were entitled to hold and realize upon these.[1]

Surety's Right to Demand and Notice.

No demand need be made upon a surety prior to bringing suit against him.[2] Neither is he entitled to prompt notice of a loss covered by his obligation. Indeed it would seem that he is not positively entitled, as matter of strict right, to claim any notice at all before suit is begun against him.[3] He might perhaps lose the opportunity of recovering his payment from the principal in the bond by reason of the delay in notification. But there seems to be nothing in his contract with the bank which puts it under any obligation to look after his interests in this respect. He incurs no risk on the ground of being deprived of the opportunity to at once withdraw and annul his suretyship; for we have already seen that no new liability can accrue against him if the bank continues to employ the officer after knowledge of his misconduct. And even if this last rule should ever be construed, as is within the bounds of possibility, to apply only to cases where the officer's misconduct has been fraudulent or otherwise wrongful in its character, and not to apply where his default has been simply the result of incompetence, ignorance, or carelessness, still it would seem that if the sureties wish to secure the right to be notified even of such acts, they must insert express stipulations to that effect in their undertaking with the bank. If they neglect to take such precautions in their own interest, the law cannot be expected to interfere to protect them from the results of their own *laches*, except in cases which are tainted with actual wrongdoing.

[1] Chowne *v.* Baylis, 31 Beav. 351.

[2] Grant on Bankers and Banking, p. 260; citing Pierce *v.* Williams, 23 L. J. Exch. 322.

[3] Grant, p. 259, citing Peel *v.* Tatlock, 1 Bos. & P. 419.

CHAPTER V.

CHECKS.

Description and Elements of a Check.

A CHECK is the instrument by which, ordinarily, a depositor seeks to withdraw his funds, or any part thereof, from the bank. It is a draft or order on the bank requiring it to pay a sum named. It may be made payable "to bearer," or to "A. or bearer," or to "A. or order," or "to the order of A." In the two latter forms it must be paid to A. in person, or to one deriving title from him through his indorsement. It is customary to indorse even when the payee makes the presentment and demand. The rules governing in cases of bills of exchange, promissory notes, and other business paper made payable to order govern this description of check also. Thus it may be indorsed in blank, or to the order of B., who again may indorse in blank, or to the order of C. Any *bona fide* holder of the check indorsed in blank may fill in a special direction above the indorsement, making it payable to himself or order; and in suing thereon, though he has not written in such direction, he may declare upon it as indorsed to himself, and will sufficiently support his declaration by showing that it was

Note. — In using this chapter it should be borne in mind that it does not profess to treat exhaustively the entire subject of checks considered as a species of commercial paper. To do so would be to trespass more largely upon the domain of works on Promissory Notes, Bills, &c., than our space permits. It is of the law of checks so far as banks are parties to them, and owe duties, assume obligations, or enjoy rights in respect to them and to transactions into which they enter, that we design to treat. Beyond these limits this chapter does not pretend to state the law or cite authorities. — AUTHOR.

indorsed in blank, and that he is the holder for value and in due course of business.

If a bank refuses, without sufficient excuse, to pay a check of its depositor, it is liable to him in substantial damages. It is therefore of the first importance that it should be clearly understood by the paying officers of banks what are essential requisites going to the validity of a check, and what are merely customary formalities which may yet be legally dispensed with. For if the check be lacking in any of the former class of characteristics the bank is not only justified in refusing to pay it, but if it does pay it and there turns out to have been any thing wrong about it, rendering the payment improper, the bank must bear the loss and restore the amount paid to the drawer's credit. But, upon the other hand, though some of the latter class of characteristics may be wanting, yet the bank is not thereby excused from its obligation to pay; for the order being good at law, though in an unusual form, is competent to draw the money of the depositor. If the bank refuses to pay upon such an order, it must still, in strict law, be held to answer in damages. Clearly this is the logical sequence of the reasoning, and yet though there is now no judicial authority for saying so, it seems highly probable that in cases where this rule would operate with excessive and unreasonable severity upon the bank it may be relaxed. There is no question but that a bank is entitled to exercise great care and caution to avoid being imposed upon and robbed by fraudulent and irregular orders. There is no question that it ought to have the right to demand of its depositors reasonable assistance, and a conformity to some moderate degree of consistency of conduct in drawing their orders, in order to render this difficult task of the bank at least a practicable possibility. It cannot be said that because a depositor ordinarily uses a certain form of blank check, therefore, the occasional use of a check of a different form would authorize the bank in rejecting it, or in suspending payment till it could satisfy itself of the authenticity of the instru-

ment. Such ordinary deviations continually occur, and are to be expected. But if the order be couched in any very peculiar and unwonted shape, and bear upon its face such marks of peculiarity as naturally to cast upon it a high degree of suspicion in the minds of the bank officers, it seems only just that they should have time to assure themselves of its regularity. The depositor, having by his own eccentricity given sufficient cause for the suspicion, should not be suffered to avail himself of his own improper act to recover damages from the bank, or to put it to the vexation and expense of a lawsuit. This rule certainly seems perfectly accordant with equity and not discordant with law. At worst it cannot be doubted that the law could limit the amount recoverable to nominal damages. Equity might altogether enjoin the suit. Let us be understood, however, in laying down this rule that a very strong case must be made out by the bank in order to give it the privilege of availing itself of the rule to its full extent. For a bank is held to know its customer's handwriting, and any order in his handwriting, having the legal requisites, is a defence to the bank if it pays thereon. So that the peculiarity in an instrument of this description ought to be considerable in order to make out a satisfactory case for temporary refusal. But any noteworthy peculiarity might, perhaps, be properly admitted in evidence in a suit at law by way only of mitigation of damages, if the bank should show, as a fact, that it was exclusively by reason of this peculiarity, though the same did not constitute a legal defence, and not from any other default on its own part that it refused to make the payment. For clearly a bank has a right to demand some duties from its customer in such an important matter as that of protection from fraud in a business where frauds of a peculiarly artful and ingenious nature are continually in the course of perpetration. Further, distinctions may properly be drawn between an absolute refusal to pay, and a demand for a reasonable delay, sufficient only to enable the bank to satisfy itself of the correctness of the instrument presented.

The latter may often be proper when the former could not be considered so.

At common law no precise form is indispensable to the validity of a check, though there are some few elements which are essential and which must be present to secure its legal sufficiency. In England the statutes define certain requisites. In this country no such enactments have yet been passed. They are, however, the less missed because adjudicated cases have pretty thoroughly covered the ground. In the first place the signature of the drawer is necessary.[1] But it is not indispensable that this signature should appear in the ordinary form at the foot of the check. It may be embodied in the instrument, as for example, "I, A. B., direct," or "A. B. requests." If it be thus written in an order, otherwise sufficient and in the handwriting of the drawer, it is enough. But the handwriting of the drawer is the safeguard of the bank in making its payment; so though the instrument be not under seal and the depositor may give a simple parol authority to another to sign his name, which if it could be shown by the bank would justify its payment on the order so signed, yet this signature does not render it incumbent on the bank to pay. The signature in the handwriting of the drawer, or by his attorney, whose power has been duly notified to the bank, is an element which the bank may, and for its own safety, ought to insist upon.

The sum to be paid must be set forth with that degree of precision which will enable the bank to know with certainty what it is. It must be in terms of the national money of account, and not of foreign money. A check drawn on one of our banks by a depositor living here, and expressed in sovereigns or in francs would be properly refused payment.[2] But familiar and unmistakable abbreviations may be used. Thus in England the marks "*£. s. d.*," without more, have been

[1] Taylor *v.* Dobbins, 1 Strange, 899; Saunderson *v.* Jackson, 2 B. & P. 238; Grant on Bankers and Banking, 27.

[2] Rastell *v.* Draper, Yelver. 80; Moore, 775; Cro. Jac. 88; Grant on Bankers and Banking, 16, and note.

held sufficiently to signify pounds, shillings and pence.[1] In our own country it has been substantially held that the sign "$" intends "dollars," although the word itself nowhere appears in any other form throughout the instrument.[2] One case has gone much farther even than this, it may in fact prove rather dangerously far, when it is considered how easily a dot may slip in where it is not intended, or where a comma, which signifies a very different matter, may have been meant to be placed. An order was drawn simply for "37.89," in figures without even the mark $, and the court said that it would intend therefrom that these numbers were used as whole numbers and as decimals, to express United States currency.[3] But though a court may have been willing, in a certain case, to prefer this interpretation to the necessity of otherwise holding an instrument void for unintelligibility, it hardly follows that a bank might not be held fully justified in declining to pay a draft so indistinctly expressed on the ground of an uncertainty so great that it could not surely know what its customer's order really was. This might well be adduced as an example of one of those cases, where, even if the court should still hold the instrument sufficient to have drawn payment from the bank, yet the customer's carelessness must not only preclude him from recovering damages from the bank for refusing to pay, but should deprive him of any right of action at all.

It has been held in England, and it is undoubtedly law also in the United States, that a check must be addressed. Ordinarily our bank-checks, in the common forms, bear at the top in large type the name of the bank on which they are drawn, and usually either before this name or in the lower left-hand corner, also the words "To the cashier of" or "To the cashier." Whether or not these words "To the cashier" are indispensable to a perfect check has never been decided. The question is simply, whether if they are absent, the prominent

[1] Kearney v. King, 2 Barn. & Ald. 301.

[2] Corgan v. Frew, 39 Ill. 31.

[3] Northrop v. Sanborn, 22 Vt. 433.

name of the bank would, by virtue of its customary signification in checks generally, be deemed a sufficient addressing of the check to that bank. This certainly must be regarded as very doubtful, and until a decision should be rendered in the premises, it is decidedly safer to consider the addressing distinctly "To the cashier" as essential. No person or institution, not addressed in a check or order, is called upon to cash it, or could be protected in erroneously doing so. A payment so made is simply a gratuitous payment, which the payer can recover from no person.[1]

A check must be dated. It may be dated either on, before, or after the day it is issued. But it would seem that if a check is not dated at all, and contains no statement of a date when it is to be paid, it is never payable. For a check is payable either on the day of its date, or else on some other day specifically designated in it. So if it is not dated at all, and if no designation occurs expressed in the body, which might perhaps operate to supply the deficiency of a formal dating, it is reasonable to say that it can never become due and payment can never be demanded. If this rule, which is not directly asserted in any adjudication, goes at all too far, it is nevertheless utterly impossible to doubt that a bank would be fully justified in refusing to pay a check showing an unexplained deficiency of so important a character. It has been said that a check may be dated on Sunday, though it cannot be payable on that day.[2]

Finally it seems almost superfluous to remark in closing the list of indispensable requisites, that there must of course be sufficient words of ordering or requesting to signify the intent of the drawer that the bank should pay the sum named in the manner named. This is elementary and has never required the support of a judicial decision. Provided the check

[1] Grant on Bankers and Banking, p. 14, and authorities cited.

[2] Begbie *v.* Levy, 1 C. & J. 180. See also Grant on Bankers and Banking, p. 14. See below, Tit. "Post-dated Checks."

combines all these characteristics it is not the less a check, neither invalidated as an order on the bank by the addition of other immaterial matter; such for example is the statement that it is given for value received, or a mention of the consideration.[1]

It may be that a check is neither made payable to bearer, nor to the order of any person. That is, it may be made payable to the order of A. B., being or intended and supposed to be a fictitious name. In such case no indorsement is required, for the check is regarded as equivalent to a check made payable to bearer. So checks being filled in on printed blanks and intended also to serve as memoranda of the purpose for which they were drawn, are often made payable to words in themselves meaningless in the connection in which they are used; *e. g.* "to the order of bills payable," or of "rent," or "of 1658," or any other words not signifying either existing persons or a corporation. In all such cases the checks are regarded at law as if they had been made payable simply to bearer, and they have all the legal characteristics of checks actually so made.[2]

Issuing.

As promissory notes and deeds require delivery to complete their validity as between the immediate parties to them, so also does a check require delivery, or as it is more commonly called "issuing." It is said that a check is "issued" when it is in the hands of any person entitled to demand cash for it.[3] Thus if it be stolen, or if after being lost by the drawer it is found by some other person, it is not, in the hands of the thief or of the finder, "issued" as against the drawer. But

[1] Wells *v.* Brigham, 6 Cush. 6.

[2] Story on Promissory Notes, § 488; Willets *v.* Phœnix Bank, 2 Duer, 121; Mechanics' Bank *v.* Straiton, 3 Keyes, 365; Vere *v.* Lewis, 3 Term, 182; Minet *v.* Gibson, id. 481; 1 H. Bl. 569.

[3] Grant on Bankers and Banking, p. 14, citing *Ex parte* Bignold, 1 Deac. 735; 2 Mont. & A. 633.

so far as concerns the bank it would be considered as issued, and the bank would be protected in paying it, provided it did so *bona fide* and with no knowledge of the precedent circumstances. In short checks are commercial paper, and are generally affected by the rules which affect commercial paper. Thus the holder of a check payable to bearer, or indorsed in blank, is presumed to be the owner, *bona fide*, and for value. It is only after proof that the original issue of the check was a fraud, or that it was lost by the drawer before issue, that such a holder will be required to show his *bona fides*, or to prove that he has given value for the check, and that he has come into possession of it in the usual course of business. If, being obliged to show these facts he does so successfully, it then makes no difference under what circumstances of fraud or loss the check originally left the drawer's hands; the holder shall retain and shall recover upon it, at least as much as he has paid for it. Even where in the chain of title there is a gift, known to the holder, who nevertheless had no reason to suspect any irregularity for this reason, and who paid value in the due course of business, he shall still hold and recover.[1] These principles of law will be found fully elucidated and carried out in all their details in works on bills and notes. They are usually discussed in considering questions which arise between the maker or drawer of the paper and a subsequent holder thereof. The general principles are broadly stated here simply because from them follows as an unavoidable corollary the rule that if a bank pays a check payable to bearer or indorsed in blank, upon presentment, to the holder thereof, having at the time no reasonable cause for suspecting any irregularity or any cause for refusing such payment, it will be protected in doing so, no matter what facts, unknown to it,

[1] Fuller *v.* Hutchings, 10 Cal. 523; Case *v.* Mechanics' Banking Association, 4 Comst. 166; Ross *v.* Bedell, 5 Duer, 462; Goodman *v.* Simonds, 20 How. 343, (case of a bill of Exchange); Gray's Adm'r *v.* Bank of Kentucky, 29 Penn. St. 365, (do.); Fulweiler *v.* Hughes, 17 id. 440; Stephens *v.* McNeil, 26 Barb. 651; Townsend *v.* Billinge, 1 Hilton, 353.

may have occurred prior to the presentment. Even if the party presenting be the very individual who stole the check, before issue, from the drawer, or who found it after the drawer had lost it, still, since the bank has no possible opportunity of learning these facts, the drawer shall suffer the loss. Such an instrument is as much at the risk of the person in whose possession it is as are bank bills or notes, and any injury resulting from its loss must be borne by him exclusively. A check payable to bearer or payable to order and indorsed by the payee in blank passes by delivery, just as fully and as freely as a bank-note.[1] Neither does the rule of law that an order or bill drawn on a particular fund is not negotiable cover the case of a check, for this is drawn not against a particular fund but against a general credit or account.[2] It might be added, too, that the custom of the banking business, which has been sometimes held even to give the holder of a check a right of action thereon against the bank, authorizes the negotiability and renders it part of the contract between the bank and the depositor that his checks shall be paid when presented, no matter through how many hands they may have passed in the course of business negotiation. The rule of negotiability by transfer is, however, confined in its operation to those checks which are payable in money, that is to say upon which payment in legal tender can be demanded at the option of the holder. A check drawn payable in current bank-notes is not negotiable.[3]

Checks as Bills of Exchange: Days of Grace.

Checks are continually stated to be like bills of exchange, to be governed by the same rules, sometimes, in fact, to be bills of exchange. Other authorities content themselves with stating that the analogy between these two instruments is very close. We do not propose to enter into the complications of

[1] Munn *v.* Burch, 25 Ill. 35. [2] Keene *v.* Beard, 8 C. B. (N. S.) 372.
[3] Little *v.* Phœnix Bank, 2 Hill, 425.

this discussion. It is wholly foreign to the subject of banking, of which alone we are treating. Yet in passing it may be well to observe, that, after all, the controversy seems to be little more than one of language. Thus, it makes very little difference whether it be stated that a bill of exchange and a check are substantially one and the same instrument, but that they differ, by reason of the usages of business and the manner of drawing them, in some very material points. Or whether on the other hand it be stated that they are distinct instruments, but that they have very many and very strong points of resemblance and even of identity. The one statement is simply based on a recognition of the points of resemblance as forming a bond of union strong enough to overcome the repulsion of the points of difference. The other grows out of the view that the substantial differences are more powerful to sunder, than the points of similarity are to unite, the two classes of instruments. It follows that so long as all are agreed on what are in fact the points of resemblance and what the points of difference, this is all that is really essential in the matter, and two judges having the same case for decision would come to precisely the same ultimate and practical conclusion, although the one would arrive at it by saying, "A check is a bill of exchange with differences therefrom;" and the other by saying "A check is not a bill of exchange, but has many resemblances thereto."

The main point of difference, upon which there is no diversity of authority, is that a check has no days of grace. It is payable immediately upon demand, on, or at any day after, the day of its date; and this equally though the words "on demand" are not expressed.[1] There can be no question of

[1] Moyser v. Whitaker, 9 Barn. & Cress. 409; Sutton v. Toomer, 7 id. 416; Down v. Halling, 4 id. 330; Dixon v. Nuttall, 1 C. M. & R. 307; Hare v. Copland, 13 Irish, C. L. 426; Grant on Bankers and Banking, p. 25; Story on Promissory Notes, § 489; *Ex parte* Brown, 2 Story, 503; Woodruff v. Merchants' Bank of Albany, 25 Wend. 673; Salter v. Burt, 20 Wend. 205; Morrison v. Bailey, 5 Ohio St. 13; Westminster Bank v. Wheaton, 4 R. I. 30; Chapman v. White, 2 Seld. 412; 3 Kern. 290.

this rule; the authorities are overwhelming. But it often happens that instruments otherwise in the form of checks, are yet in some way made payable at a day later than that of their issue, and sometimes later than that of their date. They may be made payable at a day later than that of their issue, but on that of their date, by being dated on a day subsequent to that of their issue, but in no other respect whatsoever differing from a check payable immediately. These are called post-dated checks; they are a familiar instrument, and will be fully discussed hereafter. It suffices for our present purpose to say, that such are always payable on, or at any time after, the day of their date.

But often an instrument, in its form substantially like a check, is made payable at a day subsequent to that both of its date and of its issue, either by naming such a date in the body of the instrument, or by making it payable so many days after date. In such cases it is often a question whether or not grace is to be allowed. But though this is the question, it does not take the form of whether or not grace is to be allowed *on such a check*, but whether or not such an instrument *is a check at all*. For if it is a *check*, that simple fact is conclusive of the fact that it is payable immediately on demand on the day named, without grace. A check is and must be always so payable. But if it be not a check then it will probably have the customary grace of the place where it is made payable, and will be called a bill of exchange.[1] The various cases present every variety of instrument each diverging in a greater or less degree and in its own peculiar manner from the ordinary form of a bank-check, dated and payable on the day of its issue.

Treating generally of an instrument dated on a certain day and by some form of words made payable at a day certain thereafter, it is probable that between the array of opposing authorities the preponderance will be considered to lie in favor of the doctrine that such paper is not to be considered as a

[1] Harker *v.* Anderson, 21 Wend. 372.

check, but as an inland bill of exchange, and so as entitled to grace. We cite below the cases which sustain this view, and it will be seen that they are numerous, and that some of them have been rendered by tribunals entitled to command great respect.[1] Of the cases cited the one carrying the most weight is certainly the New York case of Bowen *v.* Newell. This cause was litigated by the parties with great pertinacity; it is in the Reports four different times. It first appears in 5 Sandford, 326, where the court held that the instrument, being an order upon a bank to pay on a future day certain, was a check, and not entitled to grace. The decision in 5 Duer, 584, was to the same effect. But in 4 Selden, 190, a contrary opinion was rendered. The court said that the decision of Judge Story in the matter of Brown (which will be discussed hereafter) was the only authority for holding such a document to be a check, and as such not entitled to grace; that this doctrine was untenable, and that the contrary must be pronounced. The case came up once more upon a side issue, reported in 3 Kernan, 290; and here the court took pains to say that their decision in 4 Selden was to the effect that by *the principles of the law merchant* the instrument was entitled to grace, and that they were still of the same mind, though now they allowed local usage to control the law merchant. The instrument in question was drawn in New York upon a bank in Connecticut, but this fact of a difference of States was not availed of as furnishing any additional reason for considering it a bill of exchange. The decision was based broadly upon the wording of the document, which called for payment on a day certain after the date. In the Pennsylvania case, Bradley *v.* Hamilton, the words "ninety days after date" were inserted in an ordi-

[1] Morrison *v.* Bailey, 5 Ohio St. 13; Andrew *v.* Blackley, 11 id. 89; Bowen *v.* Newell, 4 Seld. 190, overruling the same case in 5 Sandf. 326; again affirmed in same case in 3 Kern. 290; Brown *v.* Lusk, 4 Yerger, 210; Daniels *v.* Kyle, 1 Kelley (Ga.), 304; Woodruff *v.* Merchants' Bank, 25 Wend. 673; Minturn *v.* Fisher, 4 Cal. 35; Bradley *v.* Delaplaine, 5 Harring. 305.

nary bank check before the words directing payment. The court said it was a bill of exchange.

Upon the other side the authorities are few, and derive their weight chiefly from the influence which attaches itself to the opinion of one who has had so much to do with the moulding of American law as Mr. Justice Story. His opinion, delivered in the matter of Brown,[1] is an elaborate disquisition, in which many questions concerning the law of checks are treated with much learning and clearness. He lays down very positively, in an argument of considerable length, that an instrument having the general form and characteristics of a check, save that being drawn and dated on a certain day, it is made payable on a future day named, is payable on and after such day, immediately upon presentment, without grace. He well remarks that the parties, by using the common form of a bank check, an instrument to which the peculiarity of carrying no grace is well known to be inseparably attached, signify that they propose to execute and issue a bank check, and not any other species of business paper whatsoever; wherefore they impliedly authorize and direct the bank to treat the document as a check, that is, to pay it immediately upon presentment and demand on any day on or after that specially named for payment. At the time of the rendition of this decision the only contrary authority was that contained in the decision in Brown *v.* Lusk, 4 Yerger, 210, which Judge Story certainly could venture to overrule, and which he did not hesitate thus to dispose of. In Harker *v.* Anderson (*supra*) Judge Cowen referred to this opinion of Judge Story with respect, and evidently inclined to indorse it fully, though the facts immediately before him did not render it wholly necessary for him to do so. Speaking also of Brown *v.* Lusk, cited above, he said that the decision in that case was based upon a citation from Chitty, which upon examination proved insufficient to support the doctrine so built upon it. But the judge's general line of argument was chiefly

[1] 2 Story, 502.

applicable to post-dated checks, about which, as before stated, the law is well settled. There remains only the Rhode Island case, Westminster Bank *v.* Wheaton,[1] in which the instrument, running thus, "Providence, Oct. 10, 1854. Ninety days after date, pay to the order of I. W. four hundred and fifty dollars. S. M., per B. C., agent," was held to be a check and not a bill of exchange.

Strong as Judge Story's argument is, the weight of judicial authority is clearly very preponderant in the opposite scale. Further, it will be observed that the latest decisions tend quite uniformly to the view that all such hybrid instruments, which are ordinary checks in all save the naming of a future day for payment, but in that respect are bills of exchange, take their legal character from this last important feature, and bear grace accordingly. The influence of New York decisions upon matters of financial law is of course of immense weight; and these backed by the troop of lesser authorities which have already adopted the same view, will doubtless finally suffice to settle the law for the country. The advantage of having the question definitively settled would be so great that the community will probably be well satisfied with a conclusion in either direction. Perhaps therefore it is better to let the tide continue in the channel which it seems inclined to adopt, till it becomes too well-worn for change. Yet we must say that the arguments of Judge Story have never been, to our mind, quite satisfactorily disposed of.

That the business community generally, in drawing such orders, have not anticipated that they would bear days of grace, but have designed to draw checks which would be payable at once on the very day named, we feel well assured. So likewise it would seem from the symptoms manifested in some of the New York cases themselves. The courts in New York are always anxious to carry out and legalize so far as possible what is known to be the common understanding of business

[1] 4 R. I. 30.

men. Nowhere else is evidence of usage and custom, in business causes, so readily admitted or so much deferred to. It is a wise and wholesome habit of the courts. So in this matter of checks payable at a future day named, when the courts had held that they should bear grace, it was at once proposed to offer evidence of usage and custom of business men not to regard such paper as entitled to any such privilege. So in the case, above discussed, of Bowen *v.* Newell, evidence of the custom of the banks of Connecticut to regard such orders as payable instantly was offered. In the last decision which was rendered in the case (3 Kernan, 290) it was said that it appeared from the findings of the lower court that the law in Connecticut gave no grace on paper of this description, that therefore of course there could be none; and that these findings of the lower court were "upon evidence derived from the best sources and of the most unquestionable character." This admirable evidence was simply evidence of usage. The court seek to insist that this rule is not at variance with the rule laid down by them on the same point in 4 Selden, 190. It is well for a court to cling to its consistency, and we can pardon desperate efforts of technical ingenuity directed to that laudable end. But the naked statement in 3 Kernan, that they are not contradicting the doctrines in 4 Selden, our intelligence forbids us to credit. However, the 3 Kernan rule is both the best in sense and the latest in time, and may be regarded as conclusive of the views of the New York judiciary. But in Ohio and California an opposite rule has been laid down, and a local custom to regard such orders as checks, and so payable at once, was held bad; and evidence thereof was declared inadmissible.[1]

Payment of Checks by the Bank.

Strictly speaking, if the bank has at the time of presentment of a check for payment, funds to the credit of the drawer suffi-

[1] Morrison *v.* Bailey, 5 Ohio St. 18; Minturn *v.* Fisher, 4 Cal. 35.

cient to meet it, unpledged by any acceptance or undertaking of the bank on his behalf, and upon which no lien for any indebtedness due from him to the bank has attached, the obligation to pay accrues instantly. The bank has no right to defer the payment with the intention of making or refusing it at a later hour, according as it shall be influenced by subsequent occurrences. The rule with checks is, "first come, first served." If payment is demanded at noon upon a check which the depositor's unencumbered balance at that hour is sufficient to pay in full, the obligation of the bank to pay it in full is at once mature and perfect. It is no matter how many checks may be presented at later hours, or how much the sum of all the checks presented in the course of the day may exceed the amount of the customer's balance. This is no concern of the bank; not even if it has been informed that such checks have been drawn and will be presented for payment. Its perfectly simple duty is to pay in full each check presented, at the time of presentment, so long as the unencumbered credit of the depositor suffices to enable it to make such payments in full. When this credit will no longer suffice for that purpose, then the bank must refuse payment altogether. But it has no right to make itself an agent either of the customer or of the holders of his checks, or of both, with the view of securing an equal distribution, *pro rata*, of the deposit of the former among such of the latter as shall make their demands during banking hours in the day. Any such proceeding is totally beyond the range of its powers and functions, and is a clear and unwarrantable usurpation of authority. For though, as we have seen, it is doubtful whether or not the simple refusal of a bank to pay a check though it has funds enough of the drawer to do so, will *per se* give the holder an instant right of action against the bank, yet it can hardly be questioned that if the bank by its wrongful conduct in so refusing caused or gave room for any disposition of the funds causing loss to the holder who was entitled to receive them, then at least he might

recover, if not upon the check, yet in a suit for damages, such amount as the wilful misconduct of the bank had stripped him of the power to obtain in the manner in which he was entitled to obtain it. Vastly stronger and more unquestionable would be the case where the bank had not only, perhaps unintentionally, caused an ultimate loss to the holder by its refusal, but where it had undertaken to distribute the drawer's funds among the check-holders *pro rata.* Not only will the bank always be protected in paying, but its clear duty and apparently its only perfectly safe course is, to pay each check as soon as it is presented, so long as the drawer's funds hold out, without paying any attention to any information it may receive or suspicions it may entertain as to other checks, or as to the drawer's financial condition. Its rights to secure its own claims, of whatever nature, are shown in the chapter on "Depositors and Customers" to be ample. It is only so long as the customer's balance of all credits against all debits remains good that the checks should be paid.[1] The only position of difficulty which can be anticipated as likely to occur for the bank is presented by the supposition that a check for an amount exceeding the drawer's balance should be presented and refused for want of funds, and that afterwards a check small enough to be discharged in full from the balance should be presented. The duty of the bank in such a case has never been judicially determined, yet upon general principles little doubt can be entertained but that the bank should cash this latter check. The fact of presentment for payment of an overdraft appears to have no legitimate effect whatsoever upon the balance of the customer. It creates no lien upon it of any description; no sound reason suggests itself why it should be regarded as affecting it at all. The bank is in no possible shape the agent of the holder to aid in securing him payment in full by retaining all sums of the drawer's which it has or may lay hands upon with a view to handing them over to this

[1] Munn *v.* Burch, 25 Ill. 35.

payee when they amount to the face of his check. A bank has no right to do this; or can only do it by the improbable method of accepting the check outright, making itself primarily liable to the holder for the full sum, and thus fastening the lien for indebtedness to itself upon the whole credit present and future of the customer till the amount is made good. Hence it follows that the simple refusal, without more, of the larger check, furnishes no ground for a subsequent refusal of the later and lesser one, which on the contrary should be paid.

The case of Munn *v.* Burch (*supra*) does not affect the principles just enunciated. That case was simply to the effect that if a check was presented for payment, there being at that time funds enough of the drawer in the bank to meet it, payments by the bank on other checks subsequently presented to an amount so far depleting the depositor's balance that it would no longer suffice to meet the first check, would be improper and wrongful. If no sufficient excuse existed for the non-payment of the first check, this conduct of the bank is obviously irregular, and tortious as towards the holder of the first check. The language held by the court would rather tend to sustain the view promulgated earlier in this chapter, that if the inexcusable and wrongful act of the bank puts the holder of the first check to any vexation, delay or loss, then the bank will be answerable to him in a suit for damages to recompense his injury. For clearly, as the court say, since the bank has done a wrong act, it must be responsible to the person upon whom the effects of the wrong fall. This person can hardly be the depositor, for his credit has been applied to his drafts, and though not in the order of presentment, yet this cannot be assumed to be a matter of any moment to him, since it is quite beyond his control. But the holder of the refused check, if he has been obliged to lose time, or to be at the cost of legal proceedings to recover the sum which he ought to have received instantly for the mere asking, still more if he ultimately fail to recover that sum in full, is very sub-

stantially injured, and directly by the wrongful and illegal action of the bank.

How far the doctrine above laid down would be subject to modification by usage may be considered somewhat doubtful. *Prima facie* it seems a fair and almost a conclusive argument, to say that a usage inconsistent with a rule of law so clear, so entwined with the whole code of laws governing checks, must be regarded as a usage bad at law and invalid. The only authority, which we have upon the point, is English, and it covers only a part of the whole ground. It seems that in that country the usage of trade has been allowed by the courts to establish a rule: — That a check drawn upon a banker in the city of London "may be retained by the banker on whom it is drawn until five o'clock P. M. of the day on which it is presented, and if there be no assets, it may then be returned to the person presenting it, and that too although it has been, in the first instance, cancelled by mistake, as intended to be honored." But it will be observed that this rule, though it countenances the retention of checks instead of immediate payment, out of deference to a usage merely, does not extend, or at least is not stated to extend, to the length of allowing the banker to return those checks, which at the time of presentment might have been paid, because, by the summing up of all the checks presented during the day they appear altogether to have amounted to an overdrawing. Mr. Grant, in laying down the very passage above quoted, authorizes by implication the position assumed above, and says: "A check of the ordinary kind is strictly payable, or at least intended to be paid, immediately on demand; and this appears to be universally the case, with the exception of checks drawn on bankers in the city of London." [1] &c.

[1] Grant on Bankers and Banking, pp. 64, 65, citing, to the custom of London, Fernandey *v.* Glynn, 1 Camp. 426, n. and Leftley *v.* Mills, 4 T. R. 175 (per Buller, J.).

In what Money Checks may be paid.

The legal obligation of the bank is to pay the customer's checks in such paper or coin, and in such quantities of paper or coin of any specific denomination, as the law of the land makes legal tender in the case of any ordinary debt. Hence a tender, though of gold coin, if it be the coin of another country, is not sufficient. The question of value does not enter into the matter at all; it is a question solely of legal tender.[1] No other species of tender than that authorized by the laws of the land can relieve the bank from liability to the drawer; or from liability also to the holder, if it be considered that the holder has any right of action at all against the bank for a refusal to pay the check which he presents.

But this obligation of the bank, at strict law, may of course be waived and dispensed with by the express or implied consent of the holder of the check. He is perfectly at liberty to accept any representatives of value which the bank may offer to him. If he does so accept, that is to say, if, at the time when such representatives are offered to him, he does not object to receive them on the ground that they are not what at law he has a right to demand, then this acceptance operates as a complete waiver of the holder's right to call for legal tender, and the banker is discharged by this payment both as towards the drawer and the holder of the check. Even if the holder assents to take the promissory note of the banker, it will discharge the check absolutely and without regard to the fact of whether or not it is paid at maturity.[2] Payments are usually offered either in whole or in part in the bank bills or notes, either of the bank on which the check is drawn, or of other banks, which circulate as currency in the community. The holder may refuse these, when offered to him, if he wishes;

[1] Grant on Bankers and Banking, pp. 36–38, 40; Wade's Case, Rep. Pt. 5, 114, a, Co. Litt. 207, b; Lawrence *v.* Schmidt, 35 Ill. 440, and cases cited *infra*, which by implication, support the same doctrine.

[2] Sayer *v.* Wagstaff, 5 Beav. 415.

but if he takes them, in the absence of fraud on the part of the bank he assumes as his own the risk of their value. The waiver was perfected by the very act of acceptance, and cannot be afterward undone.[1] *E converso*, if it should happen that the funds are at a premium, the profit also is that of the receiver. In short the money or representatives of value, on the moment when they have been paid over the counter and have been fairly received and accepted without objection by the payee, become the property of the payee, for good or for ill. From the moment that the act of transfer is completed, and the minds of the parties have met and agreed upon the thing transferred as constituting a payment, instantly the right of either to repudiate or annul the transaction ceases. If the bank discovers at once that the drawer's account was overdrawn before the check was paid, it cannot recall the funds from the possession of the holder, not even if he be still at the counter, provided the act of transfer had been perfected by the intent and act of both parties, leaving nothing further to be done.[2] But it is of course essential to the working of this doctrine that both parties should be acting throughout the transaction in perfect good faith. For if the bank tender bills or notes which it knows, or which it suspects, or has reason to suspect, are either depreciated or worthless, or are likely immediately to become so, and keeps this fact a secret from the payee, then the payment is not good.[3] Doubtless, also, on the other hand if the payee receives, or more certainly still if he specially asks for, funds which he has private reasons for knowing to stand at a premium, the fact being unknown to and kept secret from the bank, he will not be allowed to retain the amount of the premium. Further, it is a fraud on the part of a holder, or payee of a check, to present it for payment, either at the counter to be cashed or through the clearing house by

[1] Polglass *v.* Oliver, 2 C. & J. 15; Vernon *v.* Bovery, 2 Show. 296.

[2] Chambers *v.* Miller, 13 C. B. N. S. 125; 3 F. & F. 202; Boylston Bank *v.* Richardson, decided in Mass. Supr. Ct. Aug. 30, 1869, not yet reported.

[3] Spurraway *v.* Rogers, 12 Mod. 517.

depositing it in his own bank, provided he knows at the time that the drawer has not to his credit in the bank in which it is drawn, any funds or not sufficient funds to meet it. The holder has no right to attempt to mislead the drawer's bank into erroneously honoring the check, and then to keep the money if his *ruse* is successful. Under such circumstances the mistake of the bank will be revocable at any time after the completion of the transaction; and it may, if need be, recover the amount of the wrong payment in a suit directly against the payee.[1]

Valid agreements may at any time be entered into between the bank and the customer concerning the species of money or currency in which his checks may or shall be honored. The holders of the checks need be no parties to this agreement, for, until they have demanded payment upon their checks, they have no rights which are infringed by the arrangement. They have accepted from their debtor his check as a substitute for money, but the bank is not therefore liable to pay them money. The nature of the duty of the bank to them is determined by the nature of its duty to the depositor. It is bound to offer to them whatever it has undertaken with him that it will offer to holders of his checks. If this be unsatisfactory to the holders, their sole recourse and remedy is against him. But an agreement of this kind does not cover checks drawn before it was entered into, though not presented till afterwards, unless they were in terms included. In the absence of an express stipulation concerning them, they remain payable in the same currency in which the bank would be bound to pay had no peculiar contract been entered into. For the arrangement by the drawer can have no bearing on checks previously issued, and the accrued rights of the holders of them, which without his knowledge might still be unpresented.[2]

At present, in our country, the Treasury notes of the United States have been made by act of Congress, a legal tender, and

[1] Martin v. Morgan, Gow, 123; cited to same point in Byles on Bills, p. 16.
[2] Marine Bank v. Ogden, 29 Ill. 248.

payment, or offer of payment in them, discharges the bank. Though if it has bound itself by a specific agreement to pay in gold or silver coin, it must do so. Even a State bank organized under State laws, which in terms require all its payments to be made only "in gold and silver," has been held exonerated from this obligation by the supreme authority of Congress, and declared able to discharge all its indebtedness by tender of the Treasury notes.[1]

A payment in forged paper, or in counterfeit coin, does not discharge the bank. For, as has been already seen in the case of deposits paid into the bank in such material, they do not constitute a payment at all, but are simply a nullity.[2] In discussing payments made in counterfeit coin, Mr. Grant remarks upon the ease with which the charge of such a payment might be brought against the bank, and the great and almost insurmountable obstacles in the way of meeting and refuting it; and he says that the rule has been therefore laid down that the objection to the coin must be taken by the payee at the time when it is offered and taken, and that afterwards it will be too late. The difficulty which this rule seeks to obviate is certainly serious and substantial; but the rule itself is neither indispensable in order to meet this difficulty, nor is it intrinsically just. Fortunately Mr. Grant furnishes no citation of judicial authority for it. Why it ought never to obtain this support is easily shown. In the first place it is unjust, because it requires that every person requesting to have a check cashed, that is, pretty much every member of the community more or less frequently in his life, shall be an experienced, accurate, and rapid judge of the pureness and legitimacy of coin, or of the genuineness of bank-notes. Receiving a considerable number of coins or notes at the bank-counter, he must then and there, telling it over in the midst of the surrounding hurry of business, be able at

[1] Carpenter *v.* Northfield Bank, 39 Vt. 46.

[2] *Ante*, pp. 42, 43, and authorities cited; Grant on Bankers and Banking, pp. 38–40; Camidge *v.* Allenby, 6 Barn. & Cress. 385.

once and surely to detect a counterfeit piece. Every one knows that this is simply an impossibility. It requires a high degree of skill to pass accurately upon an ingenious and skilful counterfeit, and even an expert might well be deceived in handling the money with the rapidity and the few conveniences which must often impede the investigations of the payee. In short the rule works to him quite as great an injustice as that from which it relieves the bank. It renders it very nearly an absolute impossibility for him ever to obtain reimbursement. Then, further, the difficulty which the bank will encounter in refuting the charge is no reason whatsoever for refusing altogether to allow the injured person to prove his injury. It is a very poor rule of law that says, because the defendant has a hard task to defend himself, therefore it shall be arbitrarily laid down that no action shall ever be brought against him, and that a person who can show by the most perfect, absolute and unanswerable proof that he has not been paid his debt shall yet be forbidden to adduce such proof, and shall be strictly barred from the right of restitution simply because he did not discover the fact in an instant. It is a hard thing to defend against a charge of rape, or of breach of promise of marriage; but even criminal prosecutions are still in vogue for the former offence, and considerable sums of money are allowed to change hands in suits for the latter. The true rule is clear. It simply affects the burden of proof. The obligation upon the plaintiff to make out his case by clear, sufficient, incontestable testimony may be drawn with all the sternness and rigidity which just consideration for the hard position of the defendant may demand. Every reasonable ruling concerning the comparative thoroughness of the proof to be required of each party respectively may be given and enforced by the court. But it is both folly and injustice to say that if the plaintiff *actually proves* his right to restitution yet he shall not have it, because *if* he had been in the wrong the defendant *might* have been practically unable to show it. Let the plaintiff be held to make out his case with any degree

of thoroughness that perfect equity can demand, but if he does so make it out, then at least let him have his rights, so incontrovertibly and laboriously proved. The absolute fact, really shown, as it sometimes may be, beyond a doubt, must be allowed to draw after it the only consequence which is known to justice.

A banker is not bound to pay a check presented after banking hours. But if a check is presented after banking hours and an officer of the bank undertakes to make any answer to the payee concerning it, it has been said, though it probably would not be reiterated in the United States, that he ought to tell him that it may be paid on presentment the next morning, provided of course the condition of the drawer's account at that time warrants the statement.[1] This remark is contained in the English cases only, and it is the custom in London that a check presented after banking hours shall be marked, if the depositor has funds, and shall have precedence of others at the clearing house next day.

If the bank has not funds enough to the credit of the drawer to pay his check in full, it is not obliged to make payment in part.[2] Whether or not it would be justified in doing so, may be questioned. There is no authority on the point. Nor would banks often try to exercise such a right. If they can do so, they are obviously bound to indorse the amount of the payment on the check, which would of course still remain in the payee's hands, and which would otherwise on its face appear still to be good for the full value named in it, to the possible deception and loss of the drawer, or of innocent third parties. But the better rule perhaps would be, to save misunderstandings and complications, that if a bank cannot pay in full, it not only may not, but must not, pay at all. The drawer has not requested it to make a part payment. He has demanded that it do a certain act; to wit: pay a certain sum of money on his

[1] Whitaker v. Bank of England, 6 Carr. & P. 700; 1 Cromp. M. & R. 744.

[2] Murray v. Judah, 6 Cowen, 490.

account. If it will not do this act according to the terms of the authority embodied in the request, it by no means follows that it is authorized to substitute for it a partial performance, or in fact a materially different act. Power to pay only a part of a sum is not necessarily implied in an order, expressed without alternative, to pay that specific sum.

What will Excuse Refusal or Delay of Payment.

The position of the bank with regard to the payment of checks must often be a very delicate one. For it is as it were placed between two fires. If it refuses to pay a check, which it ought to pay, then it is liable in damages to the depositor. If it pays a check which it ought not to pay, in ninety-nine cases out of a hundred the loss will be its own. It is however noteworthy that in no case where damages have been awarded to a depositor, or where the rule has been laid down that he should have damages, has it been otherwise held or expressed than that the damages should be given for an absolute, unqualified refusal to pay. Now, it may well be that a refusal to pay, where for any sufficient cause the bank has reason to doubt the regularity of any part of the transaction, only until the bank can assure itself of the real facts, would be considered so far different from an absolute refusal that it would be sanctioned as justifiable and proper. Of course the bank should reserve funds enough, during the time of its inquiry, to meet the check if it should prove to be correct. Of course also it should make the qualified nature of its refusal and its intent so to withhold funds enough to secure the check, distinctly known to the holder at the time of his demand. Then there might be left as a fair question for a jury, whether or not the conduct of the bank was *bona fide*, and the circumstances of suspicion sufficient to justify the delay for inquiry. The finding of these facts in the affirmative ought to absolve the bank from any liability to either holder or drawer, even though neither of these parties

wilfully or negligently gave occasion for the suspicious circumstances. For the nature of the banking business is such that unless the privilege of taking reasonable precautions of this description for the prevention and detection of fraud and irregularity were allowed, prudent men would shrink from the excessive risk, and the business would fall into the hands of adventurers. Upon a strict legal basis, a demand for a brief delay of payment, for inquiry's sake, need not be construed as an absolute refusal to pay, for which alone the authorities as yet give a right of action.

It is impossible to conceive of all the various possible occurrences which might suffice to arouse a reasonable suspicion on the part of the bank that the check ought not to be paid. But if such circumstances do exist, and are sufficiently strong to give to the payment by the bank the character of gross negligence upon its part, then the loss resulting from payment is exclusively that of the bank. Where a check had been torn to pieces and pasted together again, and was in this shape presented to the bank and paid by it without inquiry, the laches of the bank was declared to be so excessive that it should bear the loss.[1] Yet, to go back to the argument of the last paragraph, it is evident that if this tearing to pieces had not been done *animo revocandi*, but accidentally, and in the hands of a *bona fide* holder who had rightfully pasted it again, and the bank had refused payment until after inquiry could be had, this dilemma would have arisen; either on the one hand that the bank would not be liable in damages to the depositor though it declined to pay on demand his *bona fide* check, rendered suspicious only after it had left his hands and without his knowledge, or on the other hand a *reductio ad absurdum* in this shape, that if the bank pays the check and it turns out that it was irregular, the bank shall bear the loss; but if the bank refuses to pay, and the check turns out regular, then the bank shall be liable in damages. The latter horn leaves the bank no safety,

[1] Scholey *v.* Ramsbottom, 2 Camp. 485; Ingham *v.* Primrose, 7 C. B. N. S. 82.

save in the power of divination. The extravagance of this real case ought to make it unquestionable that for sufficient cause the bank may demand time for inquiry without subjecting itself to a suit by the depositor, even though he be as innocent of the cause of suspicion as the bank itself. So far indeed as the reason of giving the depositor damages for a refusal is based upon the notion that his credit must suffer from it, the basis of the rule in such cases as the above is destroyed. For it can injure no depositor's credit that the bank refuses to pay upon what it believes to be a fraudulent order or a dishonest effort to secure his funds, if at the time it specifies this as the reason. This, however, is only one ground out of several upon which the rule allowing damages is supported. It may sometimes be that the depositor will suffer other substantial injury from the refusal; as, for example, he may be vexed by a lawsuit by the holder of the check. Yet even for the cost of this he ought not to recover from the bank which has innocently exercised not only a privilege essential to its safe existence, but, in a certain sense, a duty which it owes to the community. The depositor accepts the risk of such miscarriages as an inseparable incident from the convenience of using the facilities of the bank.

The death of the drawer before presentment of the check operates as an absolute revocation of the power of the bank to pay upon his check. At the instant of his death the title to his balance vests in his legal representatives, and his own order is no longer competent to withdraw any part of that which is no longer his own property.[1] It has been laid down in the text-books,[2] quite generally, that if the payment be made by the bank in ignorance of the death of the drawer, the bank will be protected. Doubtless this would be so held in equity, if not in law. But it must be acknowledged that the cited case of Tate *v.* Hilbert, which the text-books all rely upon as their sole

[1] Tate *v.* Hilbert, 2 Vesey, Jr. 111.

[2] Grant on Bankers and Banking, p. 48, n.; Byles on Bills, Sharswood's Ed. p. 24; Story on Promissory Notes, § 498, a, ed. 1868, p. 695.

authority for the statement, does not touch upon the point, and furnishes no basis for considering that the rule has the support of so much as a single adjudicated cause.

It has been carelessly laid down also in American text-books that the commission by the depositor of an act of bankruptcy revokes the power of the bank thereafter to pay his checks. Readers consulting the works which make this statement will observe that they cite for it only English authorities. In fact it is statutory law in England, and as such is peculiar to that country. The error would of course be at once detected in our courts; but its repetition ought to be promptly stopped. It is not law in the United States. Indeed there is no possibility of saying precisely at what stage of bankruptcy, in our country, the bank ceases to be justified in paying the bankrupt's checks. Certainly it is not when it first learns that he has committed an act of bankruptcy. Even the adjudication of bankruptcy, made upon the petition of the bankrupt himself or of his creditors, is an act so quietly done in the office of the register that the bank can have no knowledge of it save by accident. Whether it would be obliged to take notice of it, if it heard it by rumor, or report, is doubtful. Such authority is often untrustworthy. But the United States Marshal is directed to take possession of all the effects of the bankrupt at an early stage in the proceedings. This is the first provision which the act affords for any authoritative notice to the bankers of the cessation of the right of the bankrupt depositor to withdraw his balance. It is succeeded by publication in the papers, which doubtless must also be taken as notice, if none prior has been had. But it certainly seems that if in the interval before such actual notice from the marshal or constructive notice by publication, the bank had continued to pay checks in good faith and in ignorance, or perhaps even in an honest disbelief, of the pendency of bankruptcy proceedings, it must be impossible, in view of the provisions of the Bankruptcy Act, to say that the bank had done wrong or could be held to refund to the assignees the sum so paid away. If the bank pays on the bankrupt's check, when the law does

not sanction the payment as a discharge *pro tanto* of the bank's debt, the right of action to recover the amount lies only in favor of the assignees in bankruptcy. The authority is English; but must be regarded as of general application.[1]

Duty of the Bank confined to simple Payment.

The only act which the bank is under obligation to perform for the holder of the check, is to pay it. It is not required to answer the abstract question whether or not the drawer has funds. It is not obliged to accept or to certify. It is not bound to promise to reserve funds of the drawer to pay it at any future hour or day. Its sole and entire duty is, at the time when actual and immediate payment is demanded, to make such actual and immediate payment. It may voluntarily bind itself by any other undertaking; but in doing so it goes beyond what can be legally required of it. For its refusal to do any thing save to pay at once and in full renders it liable to no action by any person whomsoever.[2]

Stale Checks.

When a bank is entitled to consider that a check, drawn upon it and presented for payment, is stale or old and therefore subject to suspicion, and not to be paid without inquiry, is a matter on which few authorities enlighten us. No rule of law fixes any length of time that shall be conclusive against a check.[3] But Grant says that it is a sound and ordinary rule of business not to pay "old" checks without inquiry.[4] The difficulty is to say what is an "old" check. For a check may be old as between some of the parties when it is not old as between others. Thus the drawer of the check may expect it to be presented for payment, or mailed for payment if it be drawn on a bank in a distant place, on the day succeeding that

[1] Matthew *v.* Sherwell, 2 Taunt. 489; 1 Rose, 118.

[2] Bradford *v.* Fox, 39 Barb. 203.

[3] Dehers *v.* Harriot, 1 Show. 164; Brown *v.* Davies, 3 Term, 80; Sturtevant *v.* Foord, 4 Scott, N. R. 668; Rothschilds *v.* Corney, 9 Barn. & Cr. 388; Willetts *v.* Phœnix Bank, 2 Duer, 121.

[4] P. 47.

of the issuing or the delivery to the payee. If it is not so, and the bank fails subsequently and before presentment for payment, the drawer is exonerated. But on the other hand, if he be not in this or in any other manner a sufferer by the delay in presentment, he will continue to be liable on the check until the Statute of Limitations has run against it.[1] Still other rules govern the liability of indorsers. So it is apparent that, whereas a check *ought* in prudence to be presented, or put in due course for presentment, on the day following that of its delivery, yet it is in no degree invalidated by being held over indefinitely, and the only risk incurred by the holders is that of the continuing solvency of the bank. A bank can never absolutely reject a check as stale simply by reason of its age. Only when it has been kept out a length of time, which in view of the ordinary course of business is excessive, unreasonable, or suspicious, then the bank has the same privilege or duty which it has in other cases of suspicion, to wit, to insist upon a delay of payment till it can have proper time to inquire and satisfy itself of the regularity of the transaction. Yet if it be willing to run the risk and pay the check, it is protected if the check be good. For mere lapse of time does not invalidate a check, which remains a continuing authority to the bank to pay the amount which it calls for out of the depositor's funds at any time before the Statute of Limitations against simple debts has run against it. Cognate to this doctrine and supporting it by implication is the rule that the holder may sue the drawer on the check at any time before outlawry by lapse of time, provided that at any time before the institution of his suit he has presented the check for payment and payment has been refused. As the suit may be

[1] Cruger *v.* Armstrong, 3 Johns. Ca. 5; Conroy *v.* Warren, id. 259; Murray *v.* Judah, 6 Cow. 490; Mohawk Bank *v.* Broderick, 10 Wend. 306; 13 id. 133; Little *v.* Phœnix Bank, 2 Hill, 425; Pack *v.* Thomas, 13 S. & M. 11; Harbeck *v.* Craft, 4 Duer, 122; Robinson *v.* Hawkesford, 9 Q. B. 52; Mullick *v.* Radakissen, 28 Eng. Law & Eq. 94; Alexander *v.* Burchfield, 7 M. & G. 1067; Serle *v.* Norton, 2 Moody & R. 401; Laws *v.* Rand, 3 C. B. N. S. 442; Story on Promissory Notes,; Sharswood's Ed. pp. 680, 683; Grant on Bankers and Banking, p. 47.

brought at any time before outlawry, so the presentment may be made at any time before suit brought. The same limit is set upon each; and presentment could not be demanded, as an indispensable preliminary, to be made at a time when it could not legally and properly be met by the bank with a payment.[1]

Indeed in discussing as to when the taker of an old check could be held to take it, like other stale paper, subject to the same equities to which it was liable in the hands of the transferror, several authorities go so far as to say that it is never, until outlawed by lapse of time, to be considered as overdue within the operation of this rule of law. They say that in fact a check is not really due till it is demanded; therefore it[2] is not overdue till it has been presented and dishonored.

So it seems that simple age alone must be something so extraordinary as to be inconsistent with the ordinary course of business in order to give the bank the right to demand delay. It is clear, and supported by authority, — in fact by unavoidable implication from most of the authorities above cited, — that on the other hand if age to this degree exists, it is ground sufficient for insisting upon delay. Whether or not the age is so great that suspicion should have attached is a question for the jury, and would arise in any suit which might be brought against the bank for damages by reason of its refusal to cash the check immediately upon demand.[3] The cases and authorities here cited go far to support the general doctrine advocated *ante*, p. 258, for the privileges of the bank should certainly be no greater where the circumstance of suspicion is simply age of the

[1] Conroy *v.* Warren, 3 Johns. Ca. 259; Mohawk Bank *v.* Broderick, 10 Wend. 304; 13 id. 133; Gough *v.* Staats, 13 id. 549; Daniels *v.* Kyle, 1 Kelley, 304; Elting *v.* Brinkerhoff, 2 Hall, 459.

[2] Story on Promissory Notes; Sharswood's Ed. pp. 678, 679; Cruger *v.* Armstrong, 3 Johns. Ca. 5; Barough *v.* White, 4 Barn. & Cress. 325; Grant on Bankers and Banking, p. 61, *et seq.*; Rothschild *v.* Corney, 9 Barn. &. Cress. 389.

[3] Boehm *v.* Stirling, 7 Term, 423; cited to the same point in Bayley on Bills, cap. V. § 3; and both cited in Grant on Bankers and Banking, p. 62, n.; Lancaster Bank *v.* Woodward, 18 Penn. St. 357.

check, than in cases where other circumstances justify as great or greater doubts.

We will take leave of this topic with the statement of the Pennsylvanian case of the Lancaster Bank *v.* Woodward.[1] It is the most valuable of all which bear upon the matter under discussion. A check was drawn, in which a day certain was named for payment. Neither on that day nor on any subsequent day had the drawer funds in the bank to meet the check. After the lapse of one year from the day named for payment the check was presented to the bank and demand made. The bank paid it. The drawer, having in the mean time discharged the original debt, and considering therefore that the check was no longer good at least as against him, refused to reimburse the bank, which accordingly brought a suit against him. The court said that the authorities differed as to whether the question of what was reasonable time for the presentment of a check should be regarded as a question of law for the court or of fact for the jury. Generally speaking the latter was probably the better course. But in this case payment of so old a check, under such circumstances of suspicion as the drawer's continued want of any deposit to meet it, must be considered to show a degree of negligence on the part of the bank so great that the court felt itself justified in taking the case from the jury on the ground that as matter of law the bank could not recover. The circumstances were "sufficient to put the bank on inquiry;" its negligence in failing to make inquiry precluded it from relief as against the drawer.[2]

Upon whose Checks the Bank shall Pay.

The indebtedness of the bank upon a deposit is discharged *pro tanto* by its payments made upon any order, check or draft

[1] 18 Penn. St. 357.

[2] In a case in New York, arising between individuals, parties to the check, it was held that where the facts were not disputed, the question of whether or not due diligence had been used in presentment was one of law for the court. Bryden *v.* Bryden, 11 Johns. 187.

signed by any person who would have the power to demand and receive the deposit, regarded as a simple debt, and to give full and sufficient acquittance for it.

If several persons, not being partners, make a deposit to their joint credit, the bank ought, by the rule of the law merchant, to have the signatures of all of them appended to a check before paying it.[1] But if the deposit be made to their joint and several credit, then the order of any one of them may be honored. Mr. Grant intimates that in case of a payment made from a joint account solely, upon the order of less than all of the depositors, the amount paid could not be recovered by the bank from the actual signers; on the ground that the proceeding on the part of the bank would, under the circumstances, be simply a gratuitous payment. The rule is needlessly harsh, and since it is only hazarded as a surmise, unsupported by adjudications, though it may serve as an emphatic warning to banks, it cannot at present be accepted as law.

If the deposit is placed to the credit of divers persons, as *trustees*, the signature of all is indispensable to the validity of the check.

But in one case in England where the trust fund was small and there were five trustees who were scattered widely asunder throughout the Kingdom, the Court of Chancery interfered, to save expense, and made an order that payment should be made to them "or any of them."[2] Grant in citing the case[3] seems half inclined to question the propriety of the decision; and declares that at any rate it would seem that the fund must have been previously under the control of the court, as happened to be the fact in the particular case.

In England the inclination has been to extend the same principle, by analogy, to assignees of an estate in bankruptcy. Grant considers it as still doubtful whether the signature of

[1] See Grant on Bankers and Banking, pp. 29, *et seq.*; Innes *v.* Stephenson, 1 Moody & Rob. 145; Stone *v.* Marsh, Ryan & M. 364.

[2] Shortbridge's Case, 12 Vesey, Jr., 28.

[3] Grant on Bankers and Banking, p. 30.

one assignee would suffice to discharge the bank.[1] In Can *v.* Read[2] the Lord Chancellor said that he doubted whether the receipt of one assignee given in return for a payment made to him singly would discharge the debtor; that the discharge could not be absolute unless a receipt were also obtained from the co-assignee. The ruling was based on the principle that assignees in bankruptcy were a sort of trustees. Equity, however, will also exert the same control over the fund in the hands of the assignees, when one of them absconds, which we have seen that it would exert, on other sufficient cause, over an ordinary trust fund. So where one of three co-assignees absconded, the two remaining assignees petitioned the Court of Chancery that the bank should be ordered to pay upon checks signed only by them, and the Lord Chancellor made the order as requested.[3] So long as our present Bankruptcy Act remains in force the question is not one which can ever arise in this country. For the act expressly directs how the deposits and drafts of the assignees shall be made and signed, and no check can be properly paid by the bank unless it has not only been signed according to the law by both assignees, but has also been countersigned by the Register in Bankruptcy.[4]

As the ordinary rule in regard to executors and administrators is precisely the converse of that concerning trustees, and as the signature of one executor is sufficient to discharge a simple contract debtor; so the signature of one of several who are co-executors or co-administrators, *de facto*, to a check, is sufficient authority to the bank to pay it.[5]

The theory of the law furnishes no sound reason for excepting checks from the general rule that where one executes an

[1] Grant on Bankers and Banking, p. 28. [2] 3 Atkyns, 695.

[3] *Ex parte* Hunter, 2 Rose, 368; 1 Meriv. 408; stated to be decided on the authority of *Ex parte* Collins, 2 Cox, 427.

[4] Rule XXVIII., supplementary to the act to establish an uniform system of bankruptcy, approved March 2, 1867.

[5] *Ex parte* Rigby, 19 Ves. Jr., 463; Can *v.* Read, 3 Atkyns, 695; Allen *v.* Dundas, 3 Term, 125; Pond *v.* Underwood, 2 Ld. Raym. 1210; Prosser *v.* Wagner, 1 C. B. N. S. 289.

instrument simply "A. B., Trustee," or "A. B., Executor" or the like, the appended words, if not explained by the context, must be construed simply as words of description. In order to make it clear in what character or capacity A. B. is acting he should state under what trust he is trustee or of whose estate he is executor. But the duty of the bank is probably restricted to requiring a signature which shall correspond with the terms of the deposit account. If A. B. deposits money to the account of "A. B., Trustee," or of "A. B., Executor," the bank is not bound to inquire or to take notice of any fact as being intimated by these additional words. He deposits as "A. B., Trustee;" he may draw out as "A. B., Trustee." He might deposit in a fictitious name, or under a firm or corporate style, as convenience or a whim should induce him. The bank is absolved if the signature is that of the person making the deposit, and accords precisely with the name, description, or style, to the credit of which that person chose to place the money. Hence if the depositor instituted the account in his name as "trustee for C. D.," it is possible, and would follow from a rigid application of the strict rule of the law, that a check, paid from that account upon his signature simply as "trustee," might not be regarded as a good payment, if the money did not really come to the use of the trust estate. The proper and only safe rule for the bank to adopt is to require the signature to be identical in terms with the credit on the books.[1]

Where a corporation opens a deposit account with a bank, it is ordinary prudence for the bank to satisfy itself upon the matter of who are the officers competent under the charter or the by-laws to draw checks. If it makes payments upon checks signed by officers among whose legal functions the right of signature does not appear, then it runs a very serious risk of being still held responsible to the corporation for the amount thus irregularly paid away. It may find means to protect itself by showing an implied authority in the officer so

[1] See Tryon v. Oxley, 3 G. Greene (Iowa), 289.

to sign; or a subsequent ratification by the company of the particular act of signing; or possibly by proof that the money was actually spent in the due and necessary course of the corporate affairs. But these are slender reeds on which to rely. Even if these facts exist, it will probably be difficult and perhaps impossible for the bank to gather competent evidence of them. The *prima facie* case is against the bank if it pays on a check irregularly or improperly signed; and as formalities are often of vital importance in corporate affairs, a bank cannot neglect to demand strict compliance with them without incurring serious danger of loss. The power of signing checks may be conferred in a considerable variety of ways. Thus, in many States, general laws governing corporations may prescribe the rule; otherwise the charter of the particular corporation may prescribe it, perhaps in contravention of such laws. It may be left to be declared by by-laws. And in the absence of regulation in any of these methods, it may be settled by custom, course of dealing, and the implied power arising from these sources. Ordinarily, it is assumed, in the absence of specific regulation, that the treasurer has control of the funds of the company. Yet it is by no means certain that this general assumption would alone afford a safe and sufficient basis to justify the bank in paying money on a treasurer's check. The technical theory is that a check is like an acquittance, discharge, or receipt given for an ordinary money debt. But it by no means follows that this rule can be applied as an universal touchstone, with the view of holding that a payment may be safely made on a check signed by any person who can receipt for payments made to the corporation. For it may well be that the corporation may have created an agent whose function is or includes the right to make collections and give receipts, without any right whatsoever to sign checks. Further, if the power to draw checks is conferred by statute or charter upon any designated officer, it may be that it is not conferred exclusively. The positive affirmance of the law that one shall

be able to draw checks, may not in all cases preclude the corporation from conferring expressly or by implication the same power upon other officers also. This will depend upon the language of the law of the corporate existence. The old English rule of law, requiring all documents in the nature of contracts to be executed under the corporate seal, has been so long forgotten and disused in respect to such common instruments of daily use as checks and receipts and the like, that it has almost sunk out of memory.[1]

Upon the whole, no rule can be laid down under which a bank can be sure of protecting itself, except that it shall always inform itself by sufficient inquiry who may sign and in what form they are to sign. For though ordinarily the general fiscal officer will have control of the bank deposit, yet this is not necessarily or always the case. Especially frequent is the habit of requiring his checks to be countersigned by some other of the corporate agents. How far a bank would be affected by a knowledge of such a regulation, which had not been especially brought to its notice, is still an open question. If the rule were only in the by-laws it might be regarded as incumbent on the corporation to notify the bank, rather than on the bank to inquire of the corporation. But if the law of the corporate existence were a public law, it is not at all improbable that the courts might demand knowledge of it on the part of the bank officers, as a part of their own duties. If the person whose signature is furnished to the bank at the time of the deposit, as that of the party authorized to draw checks, thereafter does draw them, the bank will be protected in its payments upon them, even though properly he was not empowered to draw.[2] In England the deed of settlement, as they style the corporate charter, often specifically requires all corporate checks to be signed by three directors.

In whatever form the check may be drawn it would seem at

[1] 9 C. B. 811; 19 L. J., C. P. 377.

[2] Fulton Bank v. New York & Sharon Canal Co., 4 Paige, 127.

least that it should be clearly signified by some words upon its face that it is designed to be and is the check of the corporation. It is by no means necessary that the signature should be that of the corporate name; but the corporate nature of the act must be clearly apparent. In the case of Serrell *v.* Derbyshire Railroad Company,[1] where the signature of three directors was required, a check was introduced which was signed by three persons, who were as matter of fact directors, but who did not so style themselves on the face of the check. Neither was there upon it any further reference to the corporation than was comprised in the impression of a stamp which bore the corporate name and a date. It was decided that the check did not sufficiently purport to be the check of the company, and would not bind the company even in the hands of a *bona fide* holder for value. It is an unavoidable corollary from this that the bank having the corporate funds on deposit would not have been protected in paying this check, and could not have had credit for the amount in its account with the corporation had the money been misapplied. But how far in such a case it would avail the bank to show that in the usual course of its previous dealing with the corporation checks drawn in this form had always been cashed without question, no authorities enable us to say. Grant puts it as a *quære*, but apparently inclines to think that evidence to this effect might materially benefit the bank, provided the transaction were in no part tainted with any approach to bad faith.[2] But the authorities[3] which he cites must be acknowledged not to be very conclusive or satisfactory.

Ordinarily every firm or partnership has its firm name or style in which the checks drawn by it are signed, either by any one of the partners or by any attorney sufficiently empowered

1 9 C. B. 811; 19 L. J., C. P. 377.

2 Grant on Bankers and Banking, p. 85.

3 Barber *v.* Gingell, 3 Esp. 60, which holds that the fact that one has habitually paid forged bills may be shown, as constituting an adoption by him of a similar bill, against which he seeks to set up the forgery; Levy *v.* Pyne, Car. & M. 453; Bult *v.* Morrell, 12 Ad. & El. 745.

thereto by the partnership. Upon any check so signed the bank is bound to make payment. As a bank is bound to know its customers' handwriting, so it is bound to know the handwriting of the various members of the partnership; for the combination of all their handwritings may be said to constitute the handwriting of the firm which is the customer. Each of them is entitled to draw a check and to sign it with the firm name, and the bank is bound to recognize and honor the instrument. In like manner it is bound to honor checks signed with the firm name by one duly empowered so to sign. But as the bank owes this duty to the firm, so the firm owes a reciprocal duty to the bank. If it admits a new partner or creates an attorney, it is bound to notify the bank, and to show his signature of the firm name. Grant lays down that the bank is not bound to pay a check signed by one who is not known to it to be a member of the copartnership, as, for example, by one who is a dormant partner.[1] But in a judicial decision, recognizing the correctness of this rule, it was also added that if there was any evidence, however slight, going to show that the bank ought to have known the fact of the signer's partnership, then the question was made for the jury: Whether or not the bank ought to have known this. If the question were answered in the affirmative the bank would be held to all the consequences of actual knowledge; if in the negative, then the bank would be acquitted by its payment.[2]

On the other hand it is allowable for the bank to show that a deposit or credit, standing in the name of an individual partner, was really partnership property, and in fact a partnership credit. By proof of this it will be absolved, if it has paid partnership checks out of these funds. But its proof must be very thorough and satisfactory. Simple evidence that the money deposited was at the time partnership property does not go far enough; but must be supplemented apparently by

[1] Grant on Bankers and Banking, p. 38.
[2] Cooke v. Seeley, 2 Exch. 749.

evidence that it was also really *paid in* on partnership account, and was designed to constitute, or at least ought rightfully to have been designed to constitute, a fund available for partnership uses and for the honoring of partnership checks.[1]

Doubtless also unless the checks were signed, as is customary, simply with the firm name, the fact might be properly regarded as so extraordinary and suspicious that the bank would be protected if in good faith it should refuse payment on them until it could have time for inquiry. At the same time it is surprising to see in what a number of cases persons do not seem to have been content to simply sign the firm name, but have discovered the greatest number of ingenious methods of evading a duty apparently so very simple and unobjectionable. Some few of these cases may possess sufficient interest or value to justify a brief summary of them. They are all English however; for the freakish disposition which must have given rise to them does not appear to have prevailed in the United States, at least not sufficiently to have found its way into the law reports.

A check signed "A. & Co. per procuration of A." is a good check to bind the firm, and may accordingly be paid by the bank from the funds standing to the credit of the firm.[2]

A check was signed by one partner only; but he distinctly stated himself to be signing also on behalf of all the rest: thus, "For A. B. C. and D. — C." It was held that the obligation bound the partnership, inasmuch as C. had authority to execute such an obligation in the name of the partnership; also that C. could not be individually held upon it.[3]

Whether or not a partner could sufficiently bind the firm by signing the individual names of the several partners respec-

[1] Sims *v.* Bond, 5 Barn. & Ad. 389.

[2] Williamson *v.* Johnson, 1 Barn. & C. 149.

[3] *Ex parte* Buckley, 14 Mee. & W. 469. This case overrules the previous case of Hall *v.* Smith reported in 1 Barn. & Cress. 407; 2 D. & R. 584; which was to a contrary effect. The opinions were given by Barons Parke, Alderson, and Platt.

tively, instead of simply signing the firm name, is a question which is perhaps not fully settled. The inclination is to answer it in the affirmative. Grant is only willing to put it as a *quære*. But the case which he cites seems fully to support the validity of this species of signature.[1]

If the partnership be dissolved, with an understanding or agreement between the partners that one of them or any other person on their behalf shall have control of the funds and affairs for the purpose of winding up the business, it is essential that the authority conferred upon this individual be clearly exclusive of any residuary or co-ordinate authority still remaining in any of the other partners. This fact should be distinctly stated to the bank. Otherwise it is possible that the bank might still be justified in continuing to pay upon checks signed by any member of the partnership; for a general power to one to settle affairs is not as a matter of legal necessity a deprivation as against the rest of all power to act in any matter;[2] neither is it authority to the bank to assume that the other partners have parted with or lost their rights in what has certainly been their own property.

Where the Ownership of the Deposit is Disputed.

The bank will always be justified in making payments upon orders of the person who brought the deposit, or upon orders of any person whom he designates as competent to control it, until it has notice that the ownership is claimed by somebody else adversely to either of these parties. Mere notice that the ownership is elsewhere is of no effect, for it may be that the true owner has delegated the use and enjoyment to another. But if the bank is notified that the right of the depositor is disputed, it should thereafter refuse to pay to either claimant, at least without a bond of indemnity, until the controversy is finally disposed of by a competent court. The mere fact that

[1] Grant on Bankers and Banking, p. 82; Norton *v.* Seymour, 3 C. B. 792.

[2] Porter *v.* Taylor, 6 Maule & Sel. 156.

A. has deposited the money of B. is not necessarily sufficient to justify the bank in paying it to B. If A. deposited it *on account of* B., then the bank may pay it to B. But if B. lent it to A., and A. deposited on his own account, the bank has no right to interfere in their private arrangements and to repay the borrower's loan, without his permission, to the lender. In such a case the bank must wait till it receives assent from A., or until a conclusive litigation protects it in a selection between the parties. Until the bank is notified by somebody else of an *adverse* claim, it will be protected in treating the fund as that of the apparent depositor. Its payments upon his orders will be valid discharges. Any obligation which it has voluntarily assumed on the strength of his ownership, as by certification of his check or otherwise, or any obligation which has been imposed upon it by operation of law, as by garnishee process, may be secured and discharged by retention in its possession of a sufficient sum from the fund to meet and acquit the same. If either party sues the bank, the court will have and will exert, as a general rule, the power to compel the plaintiff to execute to the bank a sufficient bond of indemnity as a preliminary to a judgment in his favor.[1]

The subject has been thoroughly mooted in the Pennsylvanian courts, and their decisions have been very satisfactory, as a rule. One of the rulings, however, demands notice, since it might hardly be the conclusion arrived at by all benches. Process was served upon the bank as garnishee of the nominal depositor. Judgment was rendered in favor of the plaintiff. The bank, after service of the process, paid away all the money standing to the defendant's credit. Upon issue of *scire facias* it sought to avoid its responsibility on the ground that the

[1] Farmers' & Mechanics' National Bank *v.* King, 57 Penn. St. 202. The decision in this case discusses and satisfactorily disposes of the English autherities which are to an effect different from the doctrine of the text. Stair *v.* York National Bank, 55 Penn. St. 364; Frazier *v.* Erie Bank, 8 Watts & S. 18; Harrisburg Bank *v.* Tyler, 8 id. 378; Bank of the United States *v.* Macalester, 9 Penn. St. 475; Bank of Northern Liberties *v.* Jones, 42 id. 541.

money was not really that of this depositor but that of an undisclosed principal, who found no fault with the subsequent payments. It seemed that this was really the case. But the bank's defence was not allowed to prevail, upon the ground that at the time of the service of process and the accruing of the bank's duty to hold the money, the bank did not know that the fund did not belong absolutely to the depositor. The relations of all the parties *inter se* at the moment of service, became fastened definitively and remained throughout the whole of the rest of the proceedings precisely the same. The bank then knew only the depositor; its duty then was only to pay to him or his order; the garnishment which found him the apparent owner kept him such, without regard to subsequent knowledge obtained by the bank. Wherefore the plaintiff was entitled to the money, and must under the circumstances take it from the funds of the bank.[1]

If a deposit account stands in the name of any person, not as an individual but in an official capacity, upon his decease or upon the cessation of his official character, the property in the deposit, and with this the right to draw checks against it will pass to his successor in the office. Thus a deposit account to the credit of one as executor, does not pass to his own administrators upon his decease, but to the administrators *de bonis non* of the estate of the prior deceased. The bank will be discharged only by payment made to them.[2]

If two distinct firms unite in their capacities as such to form a third firm, payment upon the check of either of the component firms is valid.[3]

It remains however to be said in reference to all these questions of how checks are or are not validly signed, that if in any case a check has been paid by the bank upon an insuffi-

[1] Jackson *v.* Bank of the United States, 10 Penn. St. 61; explained and commented on in Farmers' & Mechanics' National Bank *v.* King, 57 id. 202.

[2] Alleghany Bank's Appeal, 48 Penn. St. 328; Stair *v.* York National Bank, 55 Penn. St. 364; Farmers' & Mechanics' National Bank *v.* King, 57 id. 202.

[3] Duff *v.* East India Co., 15 Ves. Jr. 198; Collyer on Partnership, 455.

cient signature, yet there is authority to support the doctrine that if the bank can show that the money so paid was actually applied in good faith and according to the requirements of law in the due course of the execution of the trust or administration, or bankruptcy proceedings, or of the business of the corporation or partnership, from the funds of which it was paid, then the bank, in the absence of any fraud in the transaction, may be held acquitted by the payment. If the *cestuis que trustent* have really received the sums due to them under the trust; if the heirs-at-law and legatees of one deceased, and the creditors of a bankrupt have in fact received all the moneys to which the amount of the estate entitled them; if the corporators and copartners have really enjoyed the benefit of the money taken from the bank through its application in the necessary course of the conduct of their affairs, there is no reason why they should be extraneously enriched from money obtained by mulcting the bank in a second disbursement of a sum which it has once paid, though without a due regard to legal formalities. Provided the sum was honestly paid by the bank, was honestly applied and has reached its proper destination, doubtless the bank is absolved. It may not be a very valuable method of defence for the bank, which is not likely often to have the means of tracing the money, and affording satisfactory legal proof of its use, after the payment; but such as the privilege may be, it is one which enures to the bank for whatever it may in any case be worth.[1]

In the case of corporate checks signed otherwise than in accordance with the statutes or charter, in the absence of any *mala fides* or gross negligence, it is always a fair additional

[1] *In re* Norwich Yarn Co., 22 Beav. 143. The deed of settlement required a check to be signed by three directors. The court said that though money had been had by the directors in a check not so signed yet it should be allowed them in passing their accounts, *if it had been bona fide applied to the purposes of the company*. Can *v.* Read, 3 Atkyns, 695; *quære*, whether payment to one of several assignees of bankrupt estate, *unless he brought the sum to account*, would discharge debtor.

argument that the language of the law was only directory, and that if the end were practically secured by a receipt and appropriation of the money to corporate uses the bank would be held acquitted by the substantial compliance with the underlying design of the regulation.

Drawer's Power of Revocation.

A check is simply a written order of a depositor to his bank to make a certain payment. It is executory, and as such it is of course revocable at any time before the bank has committed itself to pay it. But after the bank has placed itself under an obligation, or has incurred a liability to comply with the order, the drawer's power to revoke it is at an end. Thus, after the bank has by acceptance of the check, directly undertaken and promised the holder to honor it, the drawer is as much deprived of his right to countermand it as if actual payment had been made. But if the holder has presented the check and demanded payment, and payment has for any reason or by any accident been refused, when properly it ought to have been made, then the question of the drawer's power to revoke subsequently to such demand depends upon the still unsettled question of whether or not the demand under such circumstances creates a lien in favor of the holder upon the funds in the hands of the bank, or perfects an equitable appropriation or assignment of them to him, or gives him a right of action against the bank to obtain them. A decision in favor of the holder's enjoyment of these rights carries with it the loss of the drawer's power of revocation, since he is thereby deprived of the right to control the funds. A contrary decision leaves the right of revocation still existent and valid. The remark once fell from Judge Story, in the oft-cited "Matter of Brown," that the drawer of a check had no right to countermand payment at the bank. It was obvious from the context that the judge referred rather to moral right than to legal right. He meant simply that a debtor who had given to his creditor a

check in payment of the debt had no right as towards that creditor, "right" being considered as a matter of honesty, to order non-payment of the check. The language of the judge, taken in isolation from the circumstances of the case, and from the remainder of the opinion, seems to admit a different meaning, and is therefore capable of a misinterpretation and misuse, which have sometimes been feebly attempted. But if such a misunderstanding is possible, still the authorities to the contrary effect are numerous, and leave no shadow of doubt upon the point. The bank is the drawer's agent. Its primary duty is to hold or to pay his money as he directs. Primarily it owes no duty to the holder, except under and by virtue of directions from the drawer. Until, by reason of these directions, it has assumed voluntarily, or by action of law has involuntarily come under secondary and superseding obligations to the holder, the latest orders from the drawer govern its right to act on his behalf.[1] Of course so long as the drawer retains the right to countermand payment upon a check, he also retains the right himself to draw out any and all funds to his credit upon which the bank has no lien. The question in each case alike is merely of his right to control the deposit. This right he possesses until the bank has paid it out, or promised or become bound to pay it out, upon some order emanating from him, and presented for payment or acceptance at the bank-counter. It is a matter of no consequence how many checks are, with the knowledge of the bank, outstanding

[1] Gibson v. Minet, 2 Bing. 7; 1 Car. & P. 247; R. & M. 68; 9 Moore, 31; Dykers v. Leather Manufacturers' Bank, 11 Paige, 612; Scott v. Porcher, 3 Meriv. 652; Lilly v. Hays, 5 Ad. & El. 548; Walker v. Rostron, 9 Mee. & W. 411; Malcolm v. Scott, 5 Exch. 601; Williams v. Everett, 14 E. 582; Fruhling v. Schroeder, 2 Bing. (New R.) 77; Morrell v. Wootten, 16 Beav. 197, which holds even that the rule is not affected by the fact that the person in whose favor the order was drawn, had no knowledge of it, and no power to take advantage of it at any time prior to the revocation. Brind v. Hampshire, 1 Mee. & W. 372; also to the same effect, Grant on Bankers and Banking, 109; Story on Promissory Notes, § 498; citing, also, Purchase v. Mattison, 6 Duer, 587; Lovett v. Cornwell, 6 Wend. 369; 1 Hall, 56; Jacks v. Darrin, 3 E. D. Smith, 557.

in the hands of his creditors at the time of his counter-direction or demand of payment of the whole fund to himself. The bank is not, and has no right to constitute itself, the agent of these parties, however honest may be their claims or hard their case. It not only owes them no duty, but it has not even any legal power to act in their behalf.

Acceptance and Certification.

The act by which the bank places itself under obligation to pay to the holder the sum called for by a check, must be the expressed promise or undertaking of the bank signifying its intent to assume this obligation, or some act from which the law will imperatively imply such valid promise or undertaking.[1] The most ordinary form which such an act assumes is the acceptance by the bank of the check, or, as it is perhaps more often called, the certifying of the check. A check is not an instrument which in the ordinary course of business calls for acceptance. The holder can never claim acceptance as his legal right. He can present for payment and only for payment. But on the other hand there is nothing in the nature of a check which intrinsically precludes its acceptance, in like manner and with like effect as a bill of exchange or draft may be accepted.[2] The bank may accept, if it chooses, and it is frequently induced by convenience, by the exigencies of business, or the desire to oblige customers, voluntarily to incur the obligation. After it has done so, it is bound

[1] A recent New York case has preferred to adopt the theory of estoppel, rather than to regard certification as equivalent to an ordinary acceptance. It declares that marking a check "good" signifies only that the maker has at that time funds enough to pay it standing unencumbered to his credit in the bank. But on the next day this mark *estops* the bank to deny that it still holds these funds in a shape to apply upon this draft. This method of viewing the transaction leads evidently to the same result both in law and in fact. It fastens the liability of the bank as much as if the mark were declared to contain the ordinary promise of an acceptance. It seems to us the less preferable of the two routes available for coming to the conclusion sought. But the question is substantially only technical.

[2] Keene *v.* Beard, 8 C. B. (N. S.) 372; Bullard *v.* Randall, 1 Gray, 605. And all the cases cited on this general topic, below.

as a direct and original promisor to the payee; it and he are parties to a contract upon which he has his right of action directly against the bank without any regard whatsoever to its relations with the depositor or the state of his account, either at the time of or at any time after the acceptance.

If the bank only accepts or certifies generally, its obligation is to pay at any time when the holder may make demand. But if the acceptance is to pay at a future day certain, then the transaction, as between the bank and the drawer, is equivalent to a loan of the amount made by the latter to the former for the period intervening between the acceptance and the date named for payment. During that interval the bank has a right to retain from the funds of the drawer in its hands a sum sufficient to meet the acceptance when it shall fall due.[1]

It has been said that the effect of a legal acceptance by the bank is to place the holder of the check in the position of a depositor; that in fact and in law he himself becomes thereby a depositor of the bank. It was not of course intended by this remark to signify that he stands precisely on the footing of one who has opened an ordinary deposit account with the bank. For example, he cannot draw checks against the amount standing to his credit. But like an ordinary depositor he is a simple contract creditor of the bank, which is bound to pay on demand to him or to his order the amount of the debt.[2] Whatever doubts may surround his previous right, simply as a check-holder, to sue the bank for the amount of his check, there is no doubt of his right of action after acceptance. The acceptance is in itself a new and perfect contract between himself and the bank, superseding the previous peculiar rights of all parties. It has been said that its technical operation is to transfer to the holder the drawer's right of action against the bank.[3] It is an inference from the language used in this case

[1] Bank of England *v.* Anderson, 4 Scott, 50.

[2] Girard Bank *v.* Bank of Penn Township, 39 Penn. St. 92.

[3] Commercial Bank of Albany *v.* Hughes, 17 Wend. 94. The same is implied

that the transaction effects a literal *transferring*, in the sense of depriving the former possessor of his rights; that is to say that the right of action given to the holder is not coexistent with another right of action still remaining in the drawer, but is identical with it, and is by the act of the bank passed over from the one to the other. The drawer can no longer sue, though the bank should finally refuse to pay the check. For he has originally only a right to demand that the check shall be duly paid on presentment, and his action lies for the damage resulting to him or to his credit from not having his debt duly discharged in the manner he has led his creditor to suppose would be sufficient. But if the holder waives his right to immediate payment, by expressly asking for or even by accepting the offer of a certification by the bank, it follows that since his act acquits the debt due him from the drawer, the drawer can thereafter have no cause or basis whatsoever on which to sue. The matter is voluntarily taken out of his hands by the other parties, who make their arrangements to suit their own convenience. Even if he has suggested or requested the arrangement, the assent of the payee and holder must be regarded as at his own sole risk. He is not obliged to take the bank's promise in place of the drawer's indebtedness. If he chooses to do so, no matter to suit whose convenience, there can be but one result. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor, discharges the debtor, and by the same action deprives him of all further concern in the premises. The bank no longer owes him any duty which he can enforce, or for the breach of which he can sue.

By the acceptance or certification of the check, therefore, an entirely new engagement is entered into by the bank with the holder and his legal transferrees. This engagement is simply and unconditionally to pay to him or them the sum named in

also in the decision rendered in Dykers *v.* Leather Manufacturers' Bank, 11 Paige, 612.

the check on demand.[1] The check ceases in fact to be a check, and becomes a promise to pay. Accordingly the rules which govern a check no longer govern this instrument. The statute of limitations only begins to run against the liability of the bank when demand for payment has been made.[2] The rule is thus laid down in the case cited, but it is probable that if any tribunal inclined to hold in the case of any ordinary deposit account, that the statute began to run in favor of the bank from the date of the last transaction between it and the depositor, analogy would lead the same bench to declare that the statute would begin to run against the holder of a certified or accepted check from the date of the bank's promise upon it. This may be directly inferred also from the language of the court in the case of the Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, cited below. The check itself is in its new form strictly "evidence of a deposit to the credit of the holder."[3] All the rules about presentment for payment at once fall to the ground. The holder need no longer regard the condition of the drawer's account or balance with the bank. The bank is bound to withhold enough from the depositor's funds to meet the demand of the holder whenever it may be made. No lapse of time before making the demand, unless it should be held that the statute of limitations had run, is laches upon the part of the holder or infringes his rights against the bank or the bank's duty towards him. If in the interval, no matter how long it be, the bank has allowed the drawer by his checks or otherwise to reduce his balance, or even wholly to withdraw it, yet the bank remains primarily liable on its original contract. It must make up any deficit from its own funds. Even if at the time of acceptance there

[1] Girard Bank *v.* Bank of Penn Township, 89 Penn. St. 92; Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 4 Duer, 219, 16 N. Y. 125; Meads *v.* Merchants' Bank of Albany, 25 N. Y. 143; Sharswood's note to Byles on Bills, p. 21, (Sharswood's Ed.); Barnes *v.* Ontario Bank, 19 N. Y. 152.

[2] Girard Bank *v.* Bank of Penn Township, 89 Penn. St. 92.

[3] Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 4 Duer, 219, 16 N. Y. 125.

were not funds of the drawer sufficient to meet the check, the bank must still keep to its promise. Delay of two months and withdrawal of the drawer's funds in the interval,[1] and again delay of one year, were held not to impair at all the liability of the bank.[2] Far the strongest case that has arisen is that of the Girard Bank *v.* Bank of Penn Township, where the check was certified October 7, 1852; the drawer's funds were not drawn out until October 10, 1854; and the check was not presented for payment till September 3, 1859. But the period of the statute of limitations had not elapsed since the certification, even if it could have begun to run at all prior to the demand, and the court did not hesitate to hold the bank liable.

This doctrine seems simple enough. Yet the number of cases in which it has been questioned by counsel and reiterated by the court intimate a lurking belief in the existence of some theory which runs counter to it and which is sufficiently sound to expect judicial support. This is doubtless to be sought in the form or phraseology by which it is customary for the bank to accept or certify the check. It is not ordinarily done by writing any distinct words indicative in terms of a promise or undertaking to pay, but simply by writing on the check, in the handwriting of the officer competent to enter into the contract on behalf of the bank, the word "*good.*" Sometimes the officer adds to this his own initials. Sometimes he writes his own name or initials without any thing more. Other methods may be in use in various places. In England, until a statute was lately passed requiring words importing a distinct promise to be written and signed, a simple mark, not being a word at all, or otherwise intrinsically intelligible, was often placed upon the checks.[3] They are called in the English cases, "marked checks."

[1] Willetts *v.* The Phœnix Bank, 2 Duer, 121.

[2] Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 4 Duer, 219, 16 N. Y. 125.

[3] Grant on Bankers and Banking, p. 56, *et seq.*, and cases cited, especially; Robson *v.* Bennett, 2 Taunt. 388; Stevens *v.* Hill, 5 Esp. 247. For the present law in England, see Dufaur *v.* Oxenden, 1 M. & Rob. 90; Corlett *v.* Conway, 5 Mee. & W. 655.

It seemed therefore not wholly inapt to argue that these words, initials, or marks, at the very most purported only to be memoranda or notes showing the presentment of the check and the fact that at the time of presentment no obstacle stood in the way of payment by the bank. In other words they signified that at that time the drawer's balance was good for the amount of the check. They signified to the holder a fact which might be valuable to him concerning the drawer's financial standing. More meaning, it was considered, could not be introduced into them; they certainly did not state a promise, and it was too much to let unintelligible letters or words create a binding obligation to pay large sums of money, for which no consideration from the promisee had ever been received by the promisor. Neither could they be wrenched into promising that the bank would continue to keep the drawer's balance good for this amount, for the sole benefit of this holder, for any indefinite period that he might choose to keep the check out. The only answer was that the words, initials, or marks were to be construed by the light of the well-known usage of business; and being thus construed there could be no question that they were designed and were always clearly understood by all parties concerned, to be a perfected contract on the part of the bank. It was not pretended that they were written without any object whatsoever, that they meant absolutely nothing. Yet among them all the word "good" was the only word or mark which could possibly have any independent meaning; and of that the meaning was doubtful. Since therefore extrinsic facts and banking usage must be introduced to explain them, why not let it really and thoroughly explain them, and not only go through a false pretence of doing so? They were a brief symbol, well understood by all the business world to signify, and ordinarily accepted as identical with, an elaborate promise. The argument in favor of the banks was only plausible; the reply was incontrovertible.[1] The question can never again be

[1] Willetts v. Phœnix Bank, 2 Duer, 121.

opened in this shape. Nothing in the law is more certain than that a bank, unless prohibited by statute, may by these words or letters bind itself absolutely to the holder of a check to pay it. But this is only the first step in the difficult labyrinth. The next is still utterly doubtful and insecure. It concerns the inherent power of any particular officer to enter into the contract of certification or acceptance on behalf of the bank, and to bind the bank by so doing. This is a question which has led to infinite litigation, and may lead to quite as much more before it is conclusively disposed of. In connection with this point it will be convenient to discuss the effect of an acceptance or certification erroneously or wrongfully made, but by an officer unquestionably authorized generally to perform the act.[1]

Ordinarily the acceptance or certification of a check is performed and evidenced by some word or mark as already described written upon the check by the banker or bank-officer. But at common law this is not necessary, and in the absence of a controlling and exclusive usage in favor of such writing, a verbal acceptance may be sufficient. Such used to be the law in England; but the statutes 1 & 2 Geo. IV. c. 78, § 2, and 19 & 20 Vic. c. 97, § 7, require an acceptance in writing. Some of the States of the Union have enacted laws to a similar effect. It is an inference from the indirect intimations and language of the various causes which form the authorities on this point, that this is one of the matters in which the analogy of bills of exchange would be regarded as directly in point and probably as conclusive.[2] It is a *semble* in the case of Barnet *v.* Smith, cited below, that the cashier's simple statement that a check was "good" is an acceptance or certification

[1] *Post*, p. 288.

[2] Barnet *v.* Smith, 10 Foster (N. H.), 256; Lemmon *v.* Box, 20 Tex. 329 (Bill of Exchange); Wheatley *v.* Strobe, 12 Cal. 92; Fruhling *v.* Schroeder, 2 Bingh. (New R.) 77; Lumley *v.* Palmer, Strange, 1000; Hardwicke, 74; Robson *v.* Bennett, 2 Taunt. 888; Grant on Bankers and Banking, p. 57; Lilly *v.* Hays, 5 Ad. & El. 548.

equally with the writing of the word itself. But this rule ought to be taken with a slight restriction. The usage of the business is, for universal benefit and protection, absolutely imperative in allowing no other construction to be placed upon so deliberate an act of the bank as the writing of the word "good" upon a check and the subsequent returning of the check to the holder to use or pass from hand to hand with this distinct attestation of its value upon it. But a simple interrogatory addressed to a cashier and his verbal answer immediately made thereto, ought to be invested with a similar force only when it can be distinctly shown that the officer's remark was understood by the interrogator and was designed by the officer himself to have precisely the same effect and legal operation which his writing the same word would have had. The custom to certify in writing is so uniform that the assumption must be that the verbal interrogatory sought, and the verbal answer conveyed, only information. The intent of both parties to enter into an original and important contract would have to be very clearly shown in order to be sustained. But if clearly shown the obligation will accrue unless this method of creating it is forbidden by legislative enactment or is held to be inconsistent with the lawful and uniform usage in such transactions.

In Morrell v. Wootten[2] it is laid down that when a depositor directs his banker to make a payment to a third party, if the banker assents to do so and the direction is made known to the third party, then the banker's assent enures to his benefit. The privity is complete, and the third party may compel payment by his own suit brought directly against the banker. But the communication to the payee is absolutely essential. The reason that such stress is laid upon this point is to be discovered in the fact that the order for payment is to be met from a general fund; where the order is for the payment of a particular fund the consent of the beneficiary is needless; for this trans-

[2] 16 Beav. 197.

action constitutes properly an assignment;[1] and since it is for his benefit his assent is supposed.

The promise of the banker must be absolute. If it be contingent, or if it be other than a distinct promise of outright and unconditional payment, it does not bind him as an acceptance. Thus, a depositor ordered his banker to hold a certain sum at the disposal of A., and notified A. of his action. The banker likewise notified A. of the direction he had received and that he had registered it. He declined, however, for the present, to accept bills for any part of the amount, since he was already in advance to his customer; and positively undertook and promised only that if remittances should come forward so that he should be enabled to comply with the directions, then he would promptly advise A. The court held that no contract arose with A., and that he had no remedy either in law or in equity against the banker.[2]

If the bank certifies the check by mistake, under the erroneous impression that it has sufficient funds of the drawer to apply upon it, there is authority for saying that the certification may under certain circumstances be revoked. If the discovery is made with reasonable promptitude and immediately notified to the holder; if the check itself still remains in the hands of the party who presented it for certification and if his position is precisely the same after the revocation that it would have been had the bank originally refused acceptance; if he has not lost his opportunity to charge indorsers; if he has parted with no collateral security, has released no sureties, has not had his power of collection from the drawer of the check diminished by any intermediate occurrence, it seems that it is not too late for the bank still to undo its mistake.[3]

It occasionally happens that a check is presented to the bank, and is not paid upon the spot by the bank but is retained

[1] To this point are cited, Row v. Dawson, 1 Ves. (Sen.) 381; *Ex parte* South, 3 Swanst. 392.

[2] Malcolm v. Scott, 5 Exch. 601; 3 Mac. & G. 29.

[3] Irving Bank v. Wetherald, 36 N. Y. 335. See also Watervliet Bank v. White, 1 Den. 608.

by it. If this happens without any distinct contemporaneous agreement between the holder and the bank as to the conditions and purpose of the retention, it will not operate as an acceptance of the check by the bank unless the retention is continued for an unreasonable length of time without explanation on the part of the bank. If the check is sent to the bank through the mail, it has even been said that the bank may hold it any length of time without incurring the liability of an acceptance. For the mere fact that a check is handed into a bank creates of itself no obligation on the part of the bank to notify the holder that it will not be paid. It is his duty to call, after a reasonable period has elapsed, and demand payment or ask whether or not it will be paid; and after the lapse of such time it will be the duty of the bank to pay or to answer him; but not before that time, for the bank always has a reasonable period for examining its accounts before it can be required to pay, or to answer whether or not it will pay. In the case of Bellasis *v.* Hester[1] such period was said to be twenty-four hours. In the case of Overman *v.* Hoboken City Bank[2] a check drawn to the order of the plaintiff was deposited in the Bank of Commerce, in New York city, and was by that bank transmitted to the Ocean Bank for the purpose of being sent thence to the defendant bank for payment. It was received, by this means, by the defendant bank, October 31, between twelve and one o'clock, noon, and by it was retained till twelve M. on the following day, when it was returned to the Ocean Bank marked "not good." At ten o'clock A.M. on the day following the Ocean Bank sent it back to the Bank of Commerce, which immediately notified the plaintiffs of the dishonor. The court held that the mere retention of the check by the defendants did not constitute an acceptance by them, or bind them to a payment. The case is cited in Judge Story's work on Promissory Notes, as settling the law upon this point.

But it should be noted that the above doctrine is only that

[1] 1 Ld. Raym. 280. [2] 2 Vroom, 563.

of the common law, unaffected by the introduction of evidence relating to the understanding and usage of business in any special locality. In the case of Overman v. Hoboken City Bank, the banks were situate in different States, and custom could probably not have been shown. Had all the banks been in New York city, such evidence would probably have been introduced. The matter is one concerning which there is usually a definite and well understood usage in every business community.

Checks as Evidence.

In considering to what force or significance a check is entitled, in any particular case, as an instrument of evidence, various circumstances may have to be considered. But a primary distinction is drawn between those cases where the litigation is between the drawer and the payee and those cases where the litigation is between the drawer and the bank. As between the drawer of the check and the payee thereof, the check is evidence of payment only when it is shown that it has been actually paid at the bank. But it is *prima facie* evidence of payment if it has been cancelled at the bank according to the custom of the bank with paid checks, or if it is shown to have been in circulation.[1] But a mere check, without more, is no evidence whatsoever of a debt due from the drawer to the payee. It must be supplemented by proof of the consideration on which the check was given.[2] As between the drawer and the bank, a check, shown to have been presented and paid, is not evidence of a loan or advance by the bank to the drawer. On the contrary the presumption of law always is that a check is drawn against, and paid out of, funds previously deposited. Accordingly a

[1] Bleasby v. Crossley, 3 Bingh. 430; Pearce v. Davis, 1 M. & Rob. 365; Patton's Adm'r v. Ash, 7 Serg. & R. 116; Mountford v. Harper, 16 Mee. & W. 825; 16 L. J., Exch. 182; Thompson v. Pitman, 1 Fost. & F. 339.

[2] Aubert v. Walsh, 4 Taunt. 293; Lloyd v. Sandilands, Gow, 15; corrected by Alderson, B. in Mountford v. Harper, 16 Mee. & W. 825; Patton v. Ash, 7 Serg. & R. 116.

paid check is *prima facie* evidence of a *repayment pro tanto* by the bank of a prior deposit. If it is claimed to be an overdraft, and that its payment was an advance to the customer, the burden of proving it to be so is upon the bank.[1]

Possession of Paid Checks.

When the bank has paid the check of a depositor it is considered to be entitled to possession of it, as a voucher for the payment.[2] But this right to possession is not absolute and valid as against all parties. It is rather a right to demand and take the check from the holder, than a strict right to possess the same. It is the custom with most banks whenever the depositor sends his book to be balanced, to return to him with it all the checks received and paid up to the date of the balancing. An obligation to do this might perhaps be inferred in most cases from the usage of business and the prior course of dealing between the bank and the depositor. For it is probable that the habit is almost universal, and it is one which may be properly adduced in evidence.[3] But further than this, there is ground for holding that it is also a duty of the bank at common law to return his paid checks to the depositor. He is considered to have the better right to them, for they are regarded as his evidence of payment of his debt to the payee named in them. The bank is said to hold them only as his agent.[4] So far is this doctrine carried, that secondary evidence of the contents of a check cannot be introduced on the ground that the bank has possession of it; the bank, of course, not being a party to the case. Also notice to one to produce a check is sufficient

[1] Fletcher *v.* Manning, 12 Mee. & W. 571; cited and approved in Lancaster Bank *v.* Woodward, 18 Penn. St. 357; Other *v.* Ireson, 3 Drew, 177; 24 L. J., Chanc'y, 654; Byles on Bills, *23. Also Sharswood's note to p. *21 of same.

[2] In the Matter of Brown, 2 Story, 512; Byles on Bills, p. *21; Sharswood's note.

[3] Regina *v.* Watts, 2 Den. (Crown C.) 14 (p. 21).

[4] Regina *v.* Watts, 2 Den. (Crown C.) 14; Burton *v.* Payne, 2 Car. & P. 520; Partridge *v.* Coates, Ry. & Mood. 153; Grant on Bankers and Banking, pp. 72, 75.

though it is in his banker's hands after payment. But at the same time there seems to be authority as well as reason for saying, that if the general right of property is in the drawer, yet a qualified right of property, or it may be more properly called a temporary right of possession, exists in the bank. A paid check can only be the subject of any value whatsoever for the purpose of serving as an item of evidence. In this capacity it has a double purpose to subserve. It is proof that the drawer has paid his indebtedness to the payee, but it is likewise proof that the bank has paid the sum named on account of the drawer. If the drawer is entitled to claim perpetual possession of it to protect him against the danger of a suit by the payee, so the bank, before giving it to the drawer, is entitled to his acknowledgment, express or implied, that it has rightfully paid that amount out of his credit or deposit. For this reason the return of the check is usually contemporaneous with the balancing of the book, that is to say with the statement of account rendered to the customer charging him with this item. Before the drawer can enforce delivery of the check to himself by the bank he ought to be required, by his acknowledgment of the bank's payment, to render the check no longer essential to the bank as its only evidence of that payment. The law of the matter may be very well gathered from the case of Regina *v.* Watts (*supra*), where the arguments offered by counsel and the answers of the judges thereto, bring out the various points with great clearness. The general rule, as stated, is based, of course, on the ordinary presumption that the check was drawn against and paid from a deposit of the drawer sufficient for the purpose. In the exceptional cases where the check of one who has not any funds, or not funds enough to meet it in full, is paid by the bank, then since the check may be the main link in the chain of proof of the bank's claim for repayment, it is fair to suppose that the rule would be so far modified as to allow the bank to retain the check, like a promissory note, as the evidence of indebtedness, until the indebtedness is discharged. So if an intention or

understanding could be shown to the effect that the check should remain in the banker's hands, after his payment upon it, as a kind of security, upon which he might, if need should be, proceed against his depositor, clearly this intent of the parties would override the general rule until such time as the banker should have been reimbursed.[1] Grant says that in case of an overdraft the banker might have a "right to retain the checks, because to part with them would be to put beyond his control the only conclusive evidence he might have of the loan, beyond the entries in his own books corresponding with the checks, which would be perhaps open to the objection, that to let them in would be to allow the making of evidence in a man's own favor."[2]

Errors in Writing Checks.

An error or omission occurring in the writing of a check, which is simply clerical, and so obvious that there can be no question in the mind of a reasonable person as to what was the actual intent of the drawer, may be safely disregarded by the bank. A payment made upon such a check according to its clearly intended tenor will be protected. Of course in determining what particular defect will be covered by this rule, the officers of the bank can have no rule beyond their own discretion. But the doctrine is designed for their protection, not for the imposition of an extraordinary duty upon them in judging of and correcting their customer's mistakes. If there can be any shade of doubt in their own minds they are perfectly at liberty to decline to put an interpretation upon the document other than its naked phraseology distinctly expresses. It is only where they voluntarily consent to adopt its obvious intent in place of its strict expression, that they will be saved harm-

[1] Grant on Bankers and Banking, p. 78, and cases cited, which however, it must be confessed, at best leave this principle to be inferred, and are far from distinctly enunciating it.

[2] Grant on Bankers and Banking, p. 81.

less in doing so if the case shall be judged to be a sufficiently clear and certain one to have authorized their action. A fair example of the species of correction which it would be safe for a bank to make is furnished by the check which the court had to construe in the case of Phipps v. Tanner.[1] There the words, "twenty-five, seventeen shillings & three pence" were written, and alone designated the sum for which the order was drawn. The omission of the word "pounds" after "twenty-five" was declared to be so clearly accidental, that it might be supplied.

Where the sum written in the body of the check differs from the sum expressed in figures in the corner or margin, the written words, as being the more deliberate act of the drawer, are presumably correct and will control the figures.[2] The rule received a strong illustration in the cited case of Smith v. Smith. The marginal figures differed from the sum written in the body, and were altered by the holder so as to make them conform to the written words, but without the knowledge or consent of the drawer. It was sought to have this transaction declared a forgery, as being an alteration of the instrument in a material part. But the court said that the marginal figures in a bill of exchange served only as an index for convenience of reference and formed no part of the bill. The bill was not vitiated by an alteration in them which only caused them to conform to the written sum. Nay, where they differ from the body, it is even laid down that evidence is inadmissible to show that the bill was in fact negotiated for their amount, and not for the amount expressed in the written words. No case could well go farther, or be more conclusive of the whole matter, than this.

Forgeries.

The general principles have been many times reiterated, that a bank is bound to know its customer's handwriting: that ac-

[1] 5 Carr. & P. 488. See also the cases discussed and cited at the beginning of this chapter, where the mark $, or the word "dollars" had been accidentally omitted in writing the check.

[2] Saunderson v. Piper, 5 Bing. (New R.) 480; Smith v. Smith, 1 R. I. 398.

cordingly if it makes payment upon a signature which is not his own, it must suffer the whole loss which shall result therefrom.[1] The same rule applies to bills of exchange, wherein the drawee is held bound to know his drawer's handwriting, and is bound to meet his own acceptance written upon a bill whereof the drawer's signature turns out to be a forgery. The rule was very vigorously and decidedly laid down, as long ago as 1762, by Lord Mansfield. A drawee had paid bills, which had been forged, as the reporter casually remarks, "by one Lee, who has since been hanged for forgery." Lord Mansfield stopped the defendant's counsel short, saying that the case was one of that description that could never be made plainer by argument; and gave his opinion that the money could not be recovered back; that the plaintiff should not have paid till he had sufficiently assured himself that the signature was in the supposed drawer's own hand; that the fault or neglect, whatever it was, lay at the plaintiff's door; and that it was too late for him to seek to mend matters when he "has lain by till the forger has come to be hanged." The analogy between the doctrine as relating to checks and that relating to bills is usually regarded as sufficiently strong to make a decision rendered upon the one instrument a perfect precedent in any case arising upon the other. The cases are commonly referred to and cited promiscuously. The first ones in our own citation are those wherein the judgment was pronounced directly upon checks; the last ones are those wherein the documents under immediate consideration were bills.

The rule in both cases is equally clear and positive. It seems often to operate with great severity upon the bank or the

[1] Bank of the United States v. Bank of Georgia, 10 Wheat. 333; Smith v. Mercer, 6 Taunt. 76; Bank of Commerce v. Union Bank, 3 Comst. 230; Goddard v. Merchants' Bank, 4 id. 147; Weisser v. Denison, 6 Seld. 68; Forster v. Clements, 2 Camp. 17; Wilkinson v. Johnson, 3 Barn. & C. 428; Levy v. Bank of the United States, 4 Dall. 234; Wilkinson v. Lutwidge, 1 Strange, 648; Jenys v. Fawler, 2 id. 946; Price v. Neale, 3 Burr. 1355; Smith v. Chester, 1 Term, 654; 1 D. & E. 655; Barber v. Gingell, 3 Esp. 60; Cocks v. Masterman, 9 Barn. & C. 92.

drawee; but it is one of those matters in which the good of the community will not allow of any other system. The drawer and drawee, morally speaking, may be regarded as equally innocent; but the loss has arisen through some degree of neglect or default, even though it be almost infinitesimal on the part of the latter, and that suffices to inflict the loss upon him. This method of viewing the matter saves the necessity of breaking the grand fundamental rule of law that money paid under a mistake of fact may be recovered back. For the fact in this case is one which the drawee has no right to mistake. The law refuses to hear him say that he has mistaken it. The money is paid through his failure to fulfil his acknowledged duty, inasmuch as he has failed to detect this very non-existence of the merely supposed fact of signature by a certain person.

In the case of Levy *v.* Bank of the United States (*supra*) the plaintiff deposited a check purporting to be that of another person. On the afternoon of the same day it was discovered by the bank to be a forgery, and was instantly returned to him. At the time of his making the deposit credit was given to him in his cash book in the usual form. Afterward the bank refused to recognize the credit, and the depositor sued to recover the sum and gained a verdict. The Supreme Court holding that the transaction of giving credit was equivalent to a cash payment, refused to interfere with the verdict. By an unfortunate imperfection in the report of this case, it is not directly stated that the check deposited purported to have been drawn by some person who was a customer of the bank. It is tolerably clear, however, that this must have been the fact. Then the plain ground of the decision is that the bank took a check as good, which its knowledge of the real signature of the supposed drawer ought to have enabled it at once to detect as bad. The case is always cited as illustrating the rule that the bank must know its customer's handwriting, and on no other state of facts could it be an authority to this effect. It is unfor-

tunate, however, that the reporter should have left so vital a fact in a leading cause to be gathered only from inference.

Where the bank seeks to recover from the person who has presented the check or bill, there is more reason for relaxing the extreme rigor of the rule. Yet even in these cases the payment, once perfected through the error of the bank or drawee, appears never to have been opened to allow recovery except where some circumstance could be shown, excusing or which might by some possibility be supposed to excuse the bank for having exercised a less degree of diligence than is usually imperatively demanded. The courts have shown a willingness to go as far as possible in helping the bank or drawee where the existence of any such exceptional circumstances could be shown, and have allowed quite slight facts to be sufficient. But apparently *some* palliating or excusing fact, insignificant as it may seem, is yet absolutely essential. In the case of Wilkinson *v.* Johnson,[1] the opinion delivered in excellent shape by Chief Justice Abbott, puts this matter very clearly. A bill, drawn on a London banking house, bearing the names of several indorsers, was dishonored. The notary of the holders carried it to the London correspondents of one of the indorsers and asked them to take it up for the honor of this indorser. They at once did so, and at the same time drew a pen through the subsequent indorsements. Shortly after they discovered the whole paper to be a series of forgeries, and directly returned it to the holders from whose notary they had received it. The whole took place within business hours of one and the same day. It was held that this case was to be distinguished from that of the failure of an acceptor or bank to recognize a customer's handwriting. The bankers to whom the bill was presented by the notary ought certainly to have known their correspondents' hand, and to have seen that their purported indorsement was a forgery. But it is not so much in the ordinary course of business to ask a correspondent to take up a

[1] 3 Barn. & C. 428.

bill for the honor of an indorser, as it is to present a bill to a drawee for acceptance, or we may add a check to a bank for payment. The very request implies the fact of the indorsement, and in a measure tends to induce less careful scrutiny. So though both parties were in fault, slightly, yet the fault of the notary *may* have led to, or contributed to, the fault of the bankers who took up the bill at his request. This is a strong illustration of the fineness of argument, built upon the minute influence conceivably exerted by a very small peculiarity, which courts have been willing to employ to save the over-harsh operation of a sound rule of law. In Goddard *v.* Merchants' Bank[1] the decision of the court, as it goes much further in the effort to create an exception to the general rule, so is much more questionable in its correctness. In that case the plaintiffs took up a forged draft for the honor of the supposed drawers, relying, in doing so, upon the statement made by the defendants' teller and notary that the defendants held a draft of the drawers named for collection, and that it had been dishonored. The plaintiffs did not at the time see the document, because it was locked up in the notary's safe and he was away, so that it could not be immediately got at. Instantly when they did see it they pronounced it a forgery. They were allowed to recover their payment on the ground that it was induced by the incorrect assertion of the defendants' agents. But Ruggles, J., delivered a strong dissenting opinion, in which he asserted that none of the cases went the length of allowing the payers to recover where they had been guilty of substantial neglect, and in his opinion it was great neglect to pay an unseen draft under the circumstances shown. Certainly this view of the case is not incapable of strong support. If the plaintiffs were willing to waive the privilege of using their own judgment on the question of the genuineness of their customer's signature, and to accept the judgment of a notary or teller of another bank, it is at least such an excessive want of ordinary precaution

[1] 4 Comst. 147.

that the law might reasonably refuse to help them out of the loss very naturally consequent thereupon.

But where the bank seeks to recover from the payee it is held rigorously to make the discovery of the forgery and to give notice of it to the holder with great promptitude. It is also at the least a very strong point, and probably an absolutely essential one, that in the interval between the presentment and payment, and the notification to the payee, he should have been deprived of no legal rights, and should have lost no practical opportunity or even chance of saving himself from loss upon the paper.[1] In the case of Wilkinson *v.* Johnson, it will be remembered, the payment and the return of the forged paper were both made within business hours of the same day, and the court dwelt with emphasis upon this and upon the consequent fact that the payees had lost none of their remedies against indorsers or others. The case of Cocks *v.* Masterman[2] is commonly regarded as a leading authority on the subject of the time within which discovery must be made and notice given. There the bill forged was returned on the day following that of the payment upon it. The court said: "We are all of opinion that the holder of a bill is entitled to know on the day when it becomes due, whether it is an honored or dishonored bill, and if he retain the money and is suffered to retain it the whole of that day," the payers cannot afterwards recover it back. For the holder, though not bound to notify the drawer and indorsers till the day after the dishonor, is yet entitled to do so, if he see fit; and the payers ought not by their negligence to be allowed to deprive the holder of the right of proceeding on the first day if he so chooses. In the opinion delivered in the case of the Canal Bank *v.* Bank of Albany, and also in the dissenting opinion of Ruggles, J., in the case

[1] Wilkinson *v.* Johnson, *supra;* Smith *v.* Mercer, 6 Taunt. 76; Cocks *v.* Masterman, 9 Barn. & C. 92; Price *v.* Neale, 3 Burr. 1354; Smith *v.* Chester, 1 T. 654; 1 D. & E. 655. The dissenting opinion of Ruggles, J., in Goddard *v.* Merchants' Bank, 4 Comst. 147.

[2] 9 Barn. & C. 92.

of Goddard *v.* Merchants' Bank (*supra*) this ruling in Cocks *v.* Masterman is criticised as too severe. But it must probably be regarded as law. The court, in delivering this opinion, take pains to prevent its being construed, by inference or otherwise, to pass as an authority for more than the simple ruling that a notice and return on the day following that of the payment in a forged bill is too late. They expressly "decline to give an opinion whether the plaintiffs could have recovered if notice had been given on the same day." Other cases say, in somewhat indefinite language, that the discovery and notice must be "immediate." All the cases cited are well worth a more thorough examination and comparison than it is possible to conduct here. It is unquestionable that after the payee has, upon the strength of the payment released any security, or abandoned or lost any possible safeguard, or protection from loss, it is too late for the bank to undo the error at his expense.

It is probable that the rule would be construed with even greater stringency against a bank which had paid a forged check, or bill of a customer, than against an individual drawee who had paid a forged bill. For in the ordinary course of business it must nearly always happen that a bank has a vastly greater opportunity for becoming acquainted with a depositor's signature than a mere business correspondent can have. This argument is one which the courts will hear and consider. For instance, in Smith *v.* Mercer, *supra*, the court said, a banker "is even more bound" to know a customer's handwriting than a drawee is bound to know a drawer's.

The rule requiring the bank to know the customer's handwriting is confined in its practical effect, it will be observed, to requiring a knowledge of his signature. Neither law nor the ordinary course of business renders it a matter of suspicion that the body of the check or bill is not written in the drawer's hand.[1] Nevertheless a false or fraudulent alteration in a ma-

[1] Bank of Commerce *v.* Union Bank, 3 Comst. 230.

terial point, made in the body of the check or bill, after signature, renders the document a technical forgery, just as much as the simulating of the signature itself.[1] Knowledge of the drawer's signature is of course no possible guide for the detection of this description of forgery, and in such cases a modification of the general rule, that payment on forged paper is no payment, has to be made, in deference to the sheer necessities of justice. The cases in which a forgery of this description is effected may be divided into two classes. It is the unquestionable duty of every person drawing a check or bill to write it in such shape that no material alteration in it can possibly be accomplished without leaving some perceptible mark of the act. This can always be done and should always be done. Therefore, if a check is altered after signature, it must be either that the alteration was one discoverable by the bank upon a tolerably thorough inspection, or that it was done without leaving the possibility of detection by reason of some neglect or carelessness on the part of the drawer. In the former case the neglect is that of the bank, and the bank accordingly suffers the loss. In the latter case the laches of the drawer has opened the door to the commission of the fraud, and he is obliged to encounter the natural consequences thereof. If the opportunity for a successful forgery is attributable to a want of due caution on the part of the person whose name is forged, then the loss shall be his.[2] But due caution on the part of the drawer of a check or bill has never been held to extend further than to the

[1] Sewall *v.* Boston Water Power Co., 4 Allen, 277; Goodman *v.* Eastman, 4 N. H. 455; 2 Parsons on Bills and Notes, 588; 4 Blackst. 249.

[2] Young *v.* Grote, 4 Bingh. 253; 12 Moore, 484; Orr *v.* Union Bank of Scotland, 1 Macq. H. L. C. 518; Bellamy *v.* Majoribanks, 21 L. J., Exch. 73; Hall *v.* Fuller, 5 Barn. & C. 750; Coles *v.* Bank of England, 10 Ad. & El. 449; Bank of Ireland *v.* Trustees, 5 H. L. C. 410; Grant *v.* Vaughan, 3 Burr. 1525; Johnson *v.* Windle, 3 Bingh. (New R.) 225; Coggill *v.* American Exchange Bank, 1 Comst. 113; Weisser *v.* Denison, 6 Seld. 68; Morgan *v.* Bank of New York, 1 Kern. 404; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Wade *v.* Withington, 1 Allen, 561; Belknap *v.* Bank of North America, Mass. 1869, not yet printed; Byles on Bills, p. 24; Story on Promissory Notes, § 490, note; Grant on Bankers and Banking, pp. 12 and 17, *et seq.*

proper writing of the instrument, as above explained. If any of his employees after it is written come into possession of it in the due course of business, as for the purpose of noting its contents, enclosing it in a letter, mailing it, or the like, and fraudulently alter it, this is not of itself any neglect on the part of the drawer. If he in the first place wrote it properly, or caused it to be written properly, the subsequent act of the employee done after the signature has been appended to it in its unobjectionable shape must leave perceptible traces on the paper, and then the loss will be that of the bank. The stage of transmission in which, and the character, opportunities, or position of the person by whom, the alteration is effected are utterly powerless to affect the drawer with any liability, provided that the check left his hands, after signature, in a form possessing the due safeguards against alteration.

The distinction between the two classes of cases will be easily made plain by a brief recital of one or two of the leading causes upon each side. Especially that of Young *v.* Grote must be selected, since it has always been cited and discussed with great respect. A depositor, going away from home, left with his wife several checks which he had signed in blank, and which she was to fill up according to her needs. She filled one up for fifty-two pounds, two shillings; but she began the word fifty with a small letter, and in the middle of a blank line; in writing the marginal figures, likewise, she left a considerable space between the mark £ and the figures 52. She gave the check in this form to her husband's clerk to get the money upon it. He inserted the words "three hundred" before the word "fifty" and the figure 3 before the figures 52, and then presented it and drew 352 pounds upon it. Here of course there were no perceptible marks indicating the alteration which had been made, and there were none such because the check had been so carelessly written that the forgery was made the simplest matter in the world. Upon this ground the court held that the loss must rest with the drawer. Only one remark may

be made by way of criticising this case. It does not appear that the clerk in making his additions attempted to liken his handwriting to that of the wife. It is probable, therefore, that there were two different handwritings in the writing of the sum. This point was not adverted to at the trial of the cause, or at least is not mentioned in the report. But Mr. Grant, in commenting on the case, inclines to think that if the body of the check had been in the handwriting of the drawer, which the bank was bound to know, then the insertion of words in another handwriting should have put the bank on inquiry. He is content, however, with a ruling which allows a diversity of hands not to be a point of suspicion, where neither of them is the hand of the drawer.[1]

The case of Belknap *v.* the Bank of North America hangs upon the other horn of the dilemma. The checks duly filled out, payable to order, were signed by the plaintiff, and were subsequently enclosed in letters and despatched to the post by the errand-boy. He opened the envelopes, obtained possession of the checks, cancelled the words "or order" in lead pencil, and inserted the words "or bearer" in ink. The money was fraudulently obtained upon these altered checks. The court considered that as matter of law, the loss was so clearly that of the bank, that the question of the negligence of the defendants in intrusting them to the boy was not open for consideration by the jury.

From this it follows that it is only a reasonable precaution for a bank to subject every check to a sufficiently careful inspection to discover whether or not it has been altered from its original form. The duty is not an onerous one. An erasure, insertion, interlineation, or cancellation can hardly be effected upon a properly written check without leaving very obvious traces of the proceeding. Whether the alteration be artfully concealed or perfectly open, as in the case of Belknap *v.* The National Bank of North America, payment will be made upon

[1] Grant on Bankers and Banking, pp. 17 and 18.

it wholly at the risk of the bank, so far, at least, as the honesty of this alteration is concerned. Yet if a case should arise where the difficulty of discovering the forgery was extraordinary and excessive, the bank would still be liable if it failed to detect it, provided no laches or default of the drawer had facilitated or increased the difficulty. The degree of difficulty, though as matter of fact it can seldom be unreasonably great, does not enter into the question in any manner.[1] The obligation of the bank is contingent upon no possible circumstance save only the due performance by the drawer of his duty to write with reasonable care against the perpetration of fraud. It is a matter however of ordinary occurrence for banks to make payments upon checks wherein words in the printed portion of the blank have been cancelled and others have been written in their place. Thus the words "or order" are often replaced by the words "or bearer," and *vice versa*. Common as it is to pay checks thus altered, yet the strict rule of law leaves all such payments at the risk of the bank. The case of Belknap above recited is directly in point and is conclusive. Whether in particular instances the course of dealing between the bank and the individual drawer would be allowed to affect the individual case and would be admissible in evidence for the purpose of modifying the rigid application of the general principle, is possibly still an open question. We should incline to put little confidence in the chance of its being decided in the affirmative. But in the absence of adjudication it must be regarded as open to doubt and discussion.

It is of course necessary that the alteration, to be worthy of consideration at all or to have any effect at all, should be in a material part of the instrument.[2] Otherwise it might be

[1] Graves *v.* American Exchange Bank, 17 N. Y. 208; Hall *v.* Fuller, 5 Barn. & C. 750; Wade *v.* Withington, 1 Allen, 561; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Sewall *v.* Boston Water Power Co., 4 Allen, 277; Robarts *v.* Tucker, 16 Q. B. 560.

[2] Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Smith *v.* Smith, 1 R. I. 398; and most of the cases cited in this connection.

entirely disregarded. This rule is too obvious and too familiar to require to be dilated upon. It will, however, be found excellently illustrated in the recital of the case of Smith *v.* Smith, given *ante*, p. 295. Whether or not the alteration is in a material part is a question "easily tested by inquiring whether the instruments would have the same legal effect and operation after the alteration as before it."[1]

Where a check is drawn payable to the order of any actually existing person or corporation, if the order or indorsement of such payee is forged, payment by the bank is no acquittance. The depositor has directed payment to be made in a certain manner; a payment made otherwise than according to his directions is no discharge of the bank's obligations towards him.[2]

It should be noted in this connection that English cases concerning checks payable to order and upon which the payee's signature has been forged, are not capable of being used as precedents in the United States. The law governing this part of the general subject of checks is in England matter of statute. Originally Parliament enacted that all checks should be drawn payable "to bearer," or to "A. or bearer." An instrument, in form a check, but drawn payable to order, was regarded as an inland bill of exchange and had to be stamped as such. It was only as the great use of checks in increasing the business facilities of the country became by degrees more fully appreciated, that the abandonment of this restrictive law was accomplished. It is by a very recent act of Parliament that checks drawn payable to order have been legalized in their proper character as

[1] Smith *v.* Smith, *supra;* Wheelock *v.* Freeman, 13 Pick. 165; Boston *v.* Benson, 12 Cush. 61; 2 Parsons on Bills and Notes, pp. 562, 588.

[2] Vanbibber *v.* Bank of Louisiana, 14 La. An. 481; Sharswood's note to Byles on Bills, p. * 21; Morgan *v.* Bank of State of New York, 1 Duer, 434; 1 Ker. 404; Graves. *v.* American Exchange Bank, 17 N.Y. 205; Coggill *v.* American Exchange Bank, 1 Comst. 118; Weisser *v.* Denison, 6 Seld. 68; Talbot *v.* Bank of Rochester, 1 Hill, 295; Canal Bank *v.* Bank of Albany, id. 287; Story on Bills, § 451.

checks rather than inland bills.[1] But the same act has a further provision exempting the banker from liability if the original or any subsequent indorsement be forged. This causes the effect of the law as a whole to be rather slight. A check payable to order, where the banker is under no liability if he pays on a forgery of the order, is only a very small degree better than a check payable to bearer. The practical advantage of the rule must depend wholly upon the conscientiousness and assiduity of the banker, who, if he be a man worthy of the trust reposed in him, will take reasonable pains to assure himself of the genuineness of the payee's signature. But where no legal punishment for neglect, however gross, short of positive bad faith, exists, there is likely always to be pretty serious danger of its occurrence.

On the other hand the argument is that the bank cannot be expected to know the signature of any random member of the community in whose favor a depositor may have occasion to draw a check payable to order.[2] This is most true; but the answer is that there is no common-law obligation upon a bank to undertake the payment of customers' checks which are made payable to order. The custom to do so is so universal that a bank may perhaps now be fairly considered as bound by the custom if it accepts a deposit account without any remarks upon this especial subject. But this is so simply because banks have found that it was so much for their interest to allow their customers the privilege of drawing such checks that they, probably without exception, have for a long time submitted to run the risks which such a system imposes. A bank which should refuse to do so would soon lose its depositors. Therefore if the custom is so well established as to be binding upon all banks, it is at least an obligation which policy

[1] 16 & 17 Vict. c. 59. See also Hare v. Copland, 13 Ir. C. L. 426.

[2] Thus it has been held in England that a bank instructed by its customer to accept bills of exchange which a correspondent of the customer's would draw against certain bills of lading, is not bound to ascertain the genuineness of the bills of lading before acceptance. Woods v. Thiedermann, 1 H. & C. 478.

and self-interest, estimated for the long run, have induced them voluntarily to assume. It is not a duty demanded of them originally by the law. This being the case, it is clear that it is a duty or obligation from which any bank may free itself as towards any or all of its customers by a notice, duly given, of its intent to do so. Nothing but the universality of the custom, which seems now to be a part of this function of the banking business, could render the notice necessary. But as the course of business is so thoroughly understood throughout the United States to give the customer the right to draw a check payable to the order of any person, and to leave to the bank the responsibility of paying only to the order of that person, it is unquestionable that without express notice to the contrary, brought home to the knowledge of the depositor, the bank would be held to this obligation and liability.

The case of Graves *v.* The American Exchange Bank[1] certainly carries the liability of the bank to an extreme, and it may be to an excessive, point. The rule is there laid down that if a check be made payable to a person, and another person of precisely the same name, or initials, so far as these are written out in the check, comes wrongfully or accidentally into possession of the same, indorses it and obtains the money on it from the bank, still the bank is liable to make good the amount to the drawer. The logical sequence which leads to this goal is clear enough. The drawer has ordered payment to be made to one person, and it has been made to another; consequently payment has not been made according to the drawer's direction and the bank is not discharged *pro tanto*. This is plain reasoning. Yet it would seem that the bank ought to be protected in such a case. A reasonable limit should be set to its liability. It cannot be supposed to have such cognizance of the private affairs of each depositor as to know in favor of what individuals he is going to draw his several checks. This is clearly impossible. The depositor orders payment to be made to A. B.

[1] 17 N. Y. 205.

A. B. presents the order and indorses it; the bank know him to be A. B., or oblige him to prove himself to be A. B., and then they pay him. Without the gift of divination what more can they do? They have used all the means of identification which the drawer has placed at their disposal, and if these have only led them into error it is certainly rather his fault than theirs. He gives them nothing but a name to guide them in selecting the payee from the various members of the community; they do all that can be done with this sole means of distinction. If the name is not enough, but should have been supplemented with descriptive language, setting forth the true payee's profession, abode, place of business, &c., &c., the drawer should have known this necessity and provided for it. He had some degree of personal knowledge of the payee, and the bank very probably had not one particle. It does its best with the light it has. The drawer has not done his best by the light he had. Clearly justice demands that the drawer should suffer in case of error induced by such a state of affairs. To our minds the decision we have referred to is a sacrifice of sound sense to technicality, and of plain reason to a fallacious sophism. But though the propriety of the ruling may be criticised, it must be admitted that it lays down the only adjudicated law in the premises. It is the only American authority. The only English authority is to the same effect. It is to be found in the case of Mead *v.* Young,[1] which was cited as an authority in Graves *v.* American Exchange Bank, and which appears to fully support that decision. It may be worth noticing that in the American case Judge Roosevelt dissented.

The use of checks payable to order introduces a slight qualification into the duty of the bank to pay immediately upon presentment and demand. It has the right to demand sufficient time to enable it to assure itself of the genuineness of the indorsement. To require satisfactory testimony of the genuineness to be furnished is the universal, unquestioned, and

[1] 4 Term, 28.

unquestionable usage of banks. They are under no obligation themselves, at least in ordinary cases, to take pains to obtain knowledge on this subject. The means of knowledge must be furnished to them. This is only reasonable. Until it is furnished the obligation to pay does not attach, and suit for a refusal will not lie. For in fact there is not properly speaking a refusal to pay a check of the drawer. No suspicion is cast upon his credit, or upon his signature, or upon the sufficiency of his balance. So far as he is concerned the bank makes no objection to pay at once. The sole obstacle arises out of the bank's ignorance of the payee's handwriting, and this it is under no duty to any person concerned in the transaction to know of its own knowledge. The points involved in this doctrine appear to have been too self-evident to have ever found their way before the judicial tribunals.

The law which has been already laid down concerns only questions arising between the bank and the drawer. In questions arising between the bank and the person to whom the bank has made payment the rule is much less stringent. Of course if the bank pays the forger or any person cognizant of the forgery, it would be entitled to recover back from him if it should have opportunity. But the rule was laid down in the case of the Canal Bank *v.* The Bank of Albany[1] that acceptance and payment, or either, concludes the drawees, *as against the payees*, only as to the genuineness of the drawer's signature. If anywhere in the chain of orders or indorsements there is a forgery, the bank may recover back, even though a considerable time has elapsed since the payment, provided that it acts with due promptitude and despatch so soon as the discovery is made. The court would not allow that the rigid rule laid down in Cocks *v.* Masterman, should govern in cases of this description. There is practical reason in this. If a bank, having a check presented for payment, which had been transferred by a long series of indorsements, is to be obliged to

[1] 1 Hill, 287.

examine into the genuineness of every one of them, it may be a very serious nuisance. Of course it must be liable to the drawer if it pay on a forgery. But it may well be allowed to place confidence in the presentor and to consider that he in presenting it warrants the accuracy of his title to it, which he has acquired through the indorsements. Then if the bank knows him to be a good and responsible man, it may at once pay him the amount, fairly expecting if there prove to be any irregularity, so that it is obliged to reimburse the amount to the drawer, then it can save itself from the loss by recourse to the person at whose request, and to whom it made the erroneous payment. Banks usually require the presentor himself to indorse, even though the prior indorsements are in blank, and then they can, of course, hold him as an indorser.

Drawer's Acknowledgment of his Signature.

It will sometimes happen that a bank, after it has made actual payment upon a check, will have some suspicion arise as to the genuineness of the drawer's signature, and will show him the check and ask him if it be good. In such case if the drawer, in good faith and under the mistaken impression that the signature is in fact his own, answers that it is his, when in fact it is not, he is not concluded by his answer from afterwards showing that the signature is in fact a forgery. Odd as such cases may seem, they are not by any means of rare occurrence in the course of business. Imperfect sight, distracted attention, a very excellent simulation of the handwriting have not unfrequently led to false statements in this respect. The cases are unanimous in declaring that the depositor is not estopped by his assertion.[1] The ground is that he does no act which affects the position of the bank. The deed of the bank

[1] Weisser *v.* Denison, 6 Seld. 68; Hall *v.* Huse, 10 Mass. 40 (a case of a promissory note); Salem Bank *v.* Gloucester Bank, 17 id. 1 (a case of bank-bills); Barber *v.* Gingell, 8 Esp. 60; Dezell *v.* Odell, 8 Hill, 215; Pickard *v.* Sears, 6 Ad. & El. 469; Leach *v.* Buchanan, 4 Esp. 226.

is perfect. Its legal effects have all accrued. The depositor, volunteering to try to answer honestly a question which concerns only such a completed transaction, is under no liability for a mistake. His answer is a gratuitous courtesy rather than a legal admission. Concerning a matter not directly interesting himself he means to give as correct information as he can. But he by no means seeks to give currency or credit to the check, which is indeed now no longer a check but a mere piece of documentary evidence. This is the general rule, and unquestionably it is sound. Exceptional cases may be conceived, of course, which would be taken out of its operation. Thus if the bank should intimate its suspicions and say that if the check were not good, and it could be promptly assured of the fact it had hopes of saving itself in whole or in part from loss, then the drawer might well be held to make a thorough scrutiny of the signature and be thereafter estopped by his acknowledgment of it as his own. Especially if in real fact that acknowledgment caused the bank to abandon substantial means of saving itself harmless. But in such a case it would be essential that the bank should state to the supposed drawer at the time its doubts and its hopes of saving itself. For even if these existed and the bank did not mention them, but to all appearance merely asked a question of curiosity or ordinary interest, the drawer would not be put under the especial and peculiar obligation which full information would lay upon him.

In criminal law it has been held that altering one's own signature to a paid check, and then insisting that it is a forgery, and demanding reimbursement from the bank, though a fraud on the bank, is not forgery.[1]

Checks Payable to Bearer.

Checks written payable to bearer pass by mere delivery. *Prima facie* the holder is the owner. They are commercial

[1] Brittain *v.* Bank of London, 3 F. & F. 465; 11 W. & R. 569.

paper, and as such a valuable consideration is presumed until proof of suspicious circumstances is introduced. Also it is presumed that they were issued by the maker. Possession is *prima facie* proof of title; but the plaintiff in a suit upon the check must show that he received it for value and in due course of business.[1] Even where a check was not addressed to any particular bank, it was yet ruled that a holder for value might recover against the drawer on a count for money had and received.[2]

A check payable to bearer does not require indorsement. Nevertheless it may be indorsed, and the indorsee may be held by a subsequent holder. To this end however the *animus indorsandi*, the indorser's intent to render himself liable as a guarantor, must appear or be shown. This is by no means a necessary inference from the mere writing of the name across the back of the instrument, which may often be done for other purposes. Thus in England it is customary for the holder of a check, upon receiving payment of the same from the banker, to write his name upon the back, and the usage of business gives to this simply the signification of his receipt for the money. Such an indorsement of course creates no liability of any description, further than that, if any, which could, under the peculiar circumstances of any individual case, grow out of a receipt expressed in full, in ordinary form.[3]

Memorandum Checks.

"Memorandum checks," so called, are instruments of quite common use in business circles. Their character and legal

[1] Byles on Bills, p. *18; Keene *v.* Beard, 8 C. B. (N. S.) 372; Woods *v.* Schroeder, 4 Harr. & J. 276; Cruger *v.* Armstrong, 3 Johns. Cas. 5; Conroy *v.* Warren, id. 259; Merchants' Bank *v.* Spicer, 6 Wend. 445; Sutcliffe *v.* M'Dowell, 2 Nor. & M. 251; Murray *v.* Judah, 6 Cow. 484; Glen *v.* Noble, 1 Blackf. 104; Humphries *v.* Bicknell, 2 Litt. 299; Shrieve *v.* Duckham, 1 id. 194; Mauran *v.* Lamb, 7 Cow. 174; Hoyt *v.* Seeley, 18 Conn. 358.

[2] Ellis *v.* Wheeler, 3 Pick. 18.

[3] Aubert *v.* Walsh, 4 Taunt. 293; Lloyd *v.* Sandilands, Gow, 13; Keene *v.* Beard, 8 C. B. (N. S.) 372; Grant on Bankers and Banking, p. 25; Byles on Bills, p. *24.

effect depend somewhat upon the parties between whom the questions concerning them arise. As between the drawer and the payee they are a species of evidence of indebtedness. They are practically intended as such, and the courts recognize them as such. They are usually given either for money borrowed, or for a debt contracted in the course of dealings. They are, in fact, and in law, equivalent to the drawer's promise to pay, for value received. The holder may sue upon them as upon a promissory note, and by reason of their peculiar character he is not held to present them at the bank for payment prior to bringing his suit against the maker.[1]

But though they are thus a complete and perfect evidence of indebtedness as between these parties, as between the bank and the payee they are still ordinary checks, nothing less nor more. The fact that the word "memorandum" or the abbreviation "memo" is written on a check, is sufficient in law to render it a memorandum check. But the bank is not bound to pay any attention to these words, or to recognize any contract as implied by them between the maker and payee which gives the check any peculiar character. If such a check is presented for payment and the drawer has to his credit funds sufficient to meet it, the bank must honor it precisely like any ordinary check. If the agreement or understanding between the drawer and the payee is, that it shall not be presented for payment, any remedy of the drawer for the breach is solely against the payee. If the check is once drawn and delivered, the drawer's reliance that it will not be presented at the bank can rest only upon the good faith of the holder. He cannot drag in the bank as a partner in the arrangement, neither alter the duty of the bank to pay his drafts out of his deposit. This

[1] Franklin Bank v. Freeman, 16 Pick. 535; Cushing v. Gore, 15 Mass. 69. In Kelley v. Brown, 5 Gray, 108, the court simply say that the pleadings are so imperfectly drawn that the questions which the plaintiff wished to have decided in his favor could not arise upon them at all. The decision is not in any respect at variance with the foregoing authorities.

is a rule of law. Usage, or the customary understanding of business men to the contrary, cannot operate to change it.[1]

Ante-dated and Post-dated Checks.

A check may be either ante-dated or post-dated. An ante-dated check is payable immediately.[2] A post-dated check is payable on, or at any time after the day of date. There is no question but that a post-dated check is in the United States a perfectly legal and proper instrument.[3] In England a statute used to require that a post-dated check should be stamped like a bill of exchange, and otherwise declared it invalid.[4] But no such rule has ever obtained in our own country. A post-dated check with us, has no peculiar characteristic whatsoever, distinguishing it from an ordinary check, beyond the mere fact of its bearing a date subsequent to the day of its actual writing and delivery. On that date, or after it, it is payable immediately, just like any other check. We are now speaking of post-dated checks strictly, and not of instruments having the general form of checks but naming a day certain, or a certain number of days after date, for their payment. The construction and legal qualities of these instruments have been already discussed. But the simple post-dated check, proper, has none of their traits; neither is it subject to any of the questions which have been mooted concerning such other nondescript, or mongrel documents. There is no possible pretence for claiming days of grace upon it. It is simply and unquestionably payable on demand so soon as the day of the date comes round.[5] But it is the

[1] Dykers v. Leather Manufacturing Co., 11 Paige, 612; Story on Promissory Notes, § 499; Byles on Bills, p. * 21; Sharswood's note; Sharswood's Ed.

[2] Story on Promissory Notes, § 490.

[3] Story on Promissory Notes, § 490; Harker v. Anderson, 21 Wend. 372; Mohawk Bank v. Broderick, 10 id. 304; 13 id. 133; Salter v. Burt, 20 id. 205; In the Matter of Brown, 2 Story, 502.

[4] Grant on Bankers and Banking, p. 22; Watson v. Poulson, 7 Eng. L. & Eq. 585; 15 Jur. 1111; Allen v. Keeves, 1 East, 435; Martin v. Morgan, 3 Moore, 635; 1 B. & B. 289; Byles on Bills, p. * 17, text and note. (Sharswood's Ed.)

[5] Mohawk Bank v. Broderick, 10 Wend. 304; 13 id. 133; Harker v. Anderson,

bank's own risk if it pay before that day. Such a payment is irregular, and circumstances may easily supervene under which the bank will be held to pay the amount again, or to restore it to the credit of the drawer, if it has debited him with it; which however it has no right to do. For it is unquestionable that in the interval between such irregular payment and the day of the date when the payment could be properly made, the amount ought still to be left standing to the credit of the drawer. The bank has no right to charge him with the disbursement till the time comes when the disbursement could be properly made on his account. His check is no order till it has matured. So if in the interval he continues to draw checks, the bank must continue to honor them upon presentment, so long as his account, without decrease by the debit of this item, is sufficient to meet them, until the day of the date arrives. When that day does arrive the bank may of course appropriate the sum it has paid out. But if then the intervening drafts have so diminished the depositor's balance that the remainder is not enough to meet the amount of the post-dated check, the deficiency must be the loss of the bank, brought upon it by its own gratuitous and uncalled-for liberality.[1] Its only source of restitution is from the depositor. Even the right to demand reimbursement from him may be taken away by his revocation in the interval before the maturity. If after the bank has paid, but before the date of the instrument gave it the right to pay, the drawer countermands his immature order and forbids payment, it is certain that the anticipatory action of the bank cannot operate to deprive him of this right.

If a post-dated check falls due on a Sunday or on a legal holiday, presentment for payment cannot be made until the day

21 id. 372; Story on Promissory Notes, § 490; In the Matter of Brown, 2 Story, 502.

[1] Grant on Bankers and Banking, p. 64; Da Silva v. Fuller, Chitty on Bills, 180 (10 Eng. ed.), cited in Morley v. Culverwell, 7 Mee. & W. 178; Godin v. Bank of the Commonwealth, 6 Duer, 76; Byles on Bills, p. * 14; Sharswood's Ed.

following. Presentment on the day preceding is irregular. The bank is not bound to pay on that day. Accordingly a demand then made is so far erroneous that it will operate to discharge an indorser, unless it should be cured by a second demand properly made on the correct day subsequent.[1]

Overdrafts.

It is not an uncommon thing for a depositor to undertake to overdraw his balance; and if he be a depositor in good standing and repute, and a good customer of the bank, his overdraft may very probably be honored by it. Of course such a payment is made by the bank wholly upon its own risk, and in sole reliance on the ability and will of the drawer to make remuneration. If he fails to do so, the bank has simply to suffer the loss. In strictness of law such a proceeding, however leniently it may be regarded among business men, is regarded as improper and illegal, unless it is accompanied with the same formalities which are the requisite accompaniments of a loan by the bank. In fact it is nothing else but a loan, and a loan of the most dangerous description, wherein the bank has no security whatsoever beyond the character of the drawer, and a chance, if he fails to make a voluntary repayment, to levy execution upon his available property, if he has any. If a cashier, not authorized, as cashiers seldom are, to loan the funds of the bank, or if the paying-teller, who probably never has such authority, pay the overdraft of a customer, without specific power from the government of the bank, but simply of their own individual motion, their act is, in the eye of the law, a breach of their trust. They have used the funds and property of the bank in a manner which the law does not authorize, and in which they have not even a color of right to use them. They have imperilled the safety of corporate money by loaning it, and the fact that it is to a customer whom they believe to be rich and honest, and a man whom it is desirable

[1] Salter *v.* Burt, 20 Wend. 205.

to favor, does not prevent the transaction from being a transgression beyond the limits of their power and duties.[1] They probably would not dream of their own sole motion of discounting the same customer's note, or making him a formal loan, even with security, yet here they in fact make him a very informal and irregular loan without security. The fact that in banking business such things are often done, and that their true character is hardly recognized or appreciated by the actors in them, is perhaps a moral extenuation, but it is certainly no legal excuse. The language of the adjudicated cases is not capable of being explained away. Such a course of dealing, long carried on by a cashier or teller with the knowledge and express or tacit approval of the bank direction, may possibly relieve him from liability to them. This is another and collateral question, by no means devoid of doubt and difficulty. It is discussed in its appropriate connection. But however such an usage or course of dealing may operate between the individual officer and the bank government, it is not allowed to be introduced in any other connection, for the purpose of rendering valid by virtue of business usage an act which the law directly makes wrongful. Evidence of such an usage will be ruled out. For however common the practice might be shown to be, it is yet an usage intrinsically bad and illegal, and which no court of justice will recognize.[2] Usage cannot do away with the safeguards which the law throws around the money and property of stockholders and depositors trusted in the custody of the officers of a corporation. The management of this money and property, and the risks to which it may be exposed, are to be determined by the government of the bank; the law declares this rule for the safety of the real owners; and the habits of the officials and customers of the bank can-

[1] Eichelberger *v.* Finley, 7 Har. & J. 381; Bank of St. Mary's *v.* Calder, 3 Strobh. 403; Lancaster Bank *v.* Woodward, 18 Penn. St. 357.

[2] Lancaster Bank *v.* Woodward, *supra.*

not be put in evidence to abrogate or annul such precautionary provisions.

Of course however there is a power in the bank to allow of overdrafts. By negotiating with the authorized and proper officials a customer may make a legal and binding arrangement by which his overdrafts, to a certain amount named and under the circumstances agreed upon, shall be honored. The dealing is in the nature of a loan; it is placing money at his disposal and control. There may be a standing agreement, binding on the bank for a definite period. Or there may be a mere naked permission, revocable at will. In the latter case it is not what is termed an "authority" to overdraw. The bank is under no obligation to honor the drawer's check, but may at any time refuse to do so. Neither is the drawer warranted in stating absolutely, solely on the strength of such an arrangement, that his check is "good."[1]

There has been some inclination to regard the drawing of overdrafts by depositors, without warning to or understanding with the bank, as a proceeding improper and even fraudulent on the part of the depositor.[2] It has been well said that a bank must often be obliged to put some reasonable amount of confidence in a depositor. And what confidence is more reasonable than that his drafts are drawn *bona fide* against his deposits, unless the bank has been notified in some manner to expect the contrary. Such a rule would probably be regarded as severe by the business community. But it has been distinctly enunciated that the drawing of a check, payable instantly, by a drawer who has no funds, is a fraud. This is hardly a stronger case than the overdrawing by a drawer who is known to have funds, which the bank, relying upon him, may suppose to be sufficient, and so be carelessly misled into an erroneous payment.[3]

[1] Ballard *v.* Fuller, 32 Barb. 68.

[2] Peterson *v.* Union National Bank, 52 Penn. St. 206; True *v.* Thomas, 16 Me. 36.

[3] True *v.* Thomas, 16 Me. 36.

If an overdraft is presented for payment and refused, this creates no lien on the drawer's actual balance in favor of the holder of the overdraft. The deposit in the bank remains utterly unaffected by this; and the duties and relations of the bank to the drawer and to all other persons are still in no respect changed.[1]

The view of the case presented above — that it is wrongful in the depositor to overdraw — leads to the conclusion that the bank may, if it choose, sue him in tort to recover the amount which it has paid on his overdraft. Such is probably the case. But there is no doubt that it may sue him in *indebitatus assumpsit* for money paid to his use. A suit brought in this shape however operates as a waiver of the tort, and in it the depositor may avail himself of all his general rights of set-off.[2]

Bank as Holder for Value.

When a check is paid by a bank, in due course of business and in actual cash, it cannot be doubted that the bank is the holder of the check for value, with all the rights customarily appurtenant to the holders of mercantile paper under the like circumstances. If the check has been deposited in the bank by a customer, who has had credit given him for its amount, and whose checks against this credit have been honored, it is equivalent to payment, and the bank stands in the same position.[3] But if the bank has only given the customer credit, and his deposit account still remains good for the amount, so that the bank can return him the check and reimburse itself from his funds in its possession, then the bank can become holder for value only by its election to allow the credit still to stand, and to retain the check as its own property. As towards the depositor, any act treating the check as its own, done after notice to it of a fraud or irregularity attaching to the instru-

[1] Dana *v.* Third National Bank, 13 Allen, 445.
[2] Bank of the United States *v.* Macalester, 9 Penn. St. 475.
[3] Market Bank *v.* Hartshorne, 3 Keyes, 187.

ment, would *prima facie* amount to such election. Though the bank might be allowed to prove, if it were able, that it undertook to act only as agent for the customer, and to the end of serving interests of his which, but for this action, must have been imperilled or lost.

Where a Check is Deposited by the Holder in the Bank on which it is Drawn.

It will often happen that the holder and the drawer of a check are customers at the same bank, and therefore that the check is deposited in the bank against which it is drawn. Slight differences in the circumstances in such cases as these may make very considerable differences in the rights and liabilities of the parties. But the abstract doctrines of the law in the premises seem to be quite plain. If the bank credits the depositor with the amount of the check, and the transaction is in perfect good faith on the part of the depositor, the act of crediting is equivalent to, and for all legal purposes is identical with, an ordinary cash payment.[1] If the deposit was not tainted with fraud, the bank cannot subsequently revoke the credit, because it finds that it was erroneously given, when the drawer had not funds enough.[2] But if there has been any fraudulent or improper conduct on the part of the depositor, as if he knew at the time of deposit that the check was an overdraft, the bank may afterward revoke the transfer of credit to him upon the same principle upon which it has been already stated that it could revoke and recover a payment made under the same circumstances.[3]

If the bank, as probably happens in the great majority of cases, simply takes the check without especial remark, and notes it in the depositor's bank-book, thus treating it in every respect as if it were a check upon any other bank instead of upon itself, these facts do not create a payment or render

[1] Bolton *v.* Richard, 6 Term, 189.

[2] Levy *v.* The Bank, 4 Dall. 286; 1 Binn. 86.

[3] Peterson *v.* Union National Bank, 52 Penn. St. 206.

the bank liable for the amount to the depositor. The officers having dealt with the check in the ordinary form have placed the bank only under the ordinary obligation, to wit: that of collecting the check in due course of business for the benefit of the depositor. The collection is not complete and the bank does not become indebted to the depositor for the amount until the credit has been actually transferred.[1] But nevertheless the depositor enjoys one advantage in this case which he would not enjoy if the check were upon another bank. The duty of applying the funds of the drawer to meet it accrues as soon as the bank receives it. If there are then, or if there are subsequently deposited, while the bank holds possession of the check, funds to the credit of the drawer, the bank is bound to apply them to the payment of this in preference over any other check which shall be presented or any other claim or lien which shall accrue *after* the deposit of this check. Liens already fastened upon the drawer's balance will still have precedence. Though where the drawer was indebted to the bank at the time, and the bank without mentioning this fact simply promised the depositor to hold the check for the purpose of applying upon it any deposits that might be thereafter made, it was held that such subsequent deposits must be first devoted to the payment of the check, although the indebtedness still remained undischarged and unsecured.[2] But if at the time the holder hands in the check, he demands to have it placed to his credit, and is informed that it shall be done; or if he holds any other species of conversation which practically amounts to demanding and receiving the promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.[3]

[1] Peterson *v.* Union National Bank, 52 Penn. St. 206; Boyd *v.* Emmerson, 2 Ad. & E. 184; Kilsby *v.* Williams, 5 Barn. & Ald. 815.

[2] Boyd *v.* Emmerson, *supra*. [3] Ibid. (per Lord Denman, C. J.).

CHAPTER VI.

COLLECTION.

The Undertaking generally.

COLLECTION upon notes, drafts, bills of exchange, and in short upon every species of business paper, is a duty very commonly undertaken by banks on behalf of their customers. Collection upon checks is probably a universal necessity of the business. Specific power to assume this duty is not usually conferred in the charter of a banking corporation. It is not necessary that it should be so, since the courts regard it as a part of the banking business.[1] After the collection is made the bank becomes a simple contract debtor for the amount, less the commission, if any has been charged. If the party for whom the collection was made is a regular depositor, the sum will be properly placed to his credit upon his general deposit account,[2] unless a peculiar usage or special instructions demand some different course of dealing. If the party has no deposit account the bank simply owes him the amount on demand. But it would seem that if it chooses the bank may credit him with it as if it were an ordinary payment on deposit and thus initiate and establish the relation of banker and depositor between itself and him. For though this may operate to place the bank under obligations and duties towards him which would not otherwise have existed, yet these are all for his advantage, and his own right to withdraw the whole sum instantly upon demand is in

[1] Tyson *v.* State Bank, 6 Blackf. 225.
[2] Marine Bank *v.* Rushmore, 28 Ill. 463.

no respect altered, if he does not wish to ratify the option of the bank and to become an ordinary depositor.[1]

Sometimes banks charge a commission for collection where the business is required to be done in distant places. Sometimes they do it without charge, trusting to the indirect profits and advantages which may be expected to accrue by reason of the chance of the money being left uncalled for during a few days following its actual receipt, and their consequent use of it for that time; or from the hope of attracting customers and increasing their business by offering such facilities without extra charges. These motives of self-interest, which must always be supposed to influence the bank when it consents to collect without direct compensation, are regarded as a sufficient and valuable inducement for the undertaking to collect; and prevent the bank from availing itself of the plea that its contract was without consideration.[2]

A bank receiving paper for collection is generally the agent of the party from whom it receives it; sometimes of the real owner, if he stands further removed in the chain of title.[3] But in no case and in no sense is it the agent or trustee for the maker of the paper, or for the party who is indebted thereon. If the debtor simply pays into the bank the amount due and takes up his paper, he is thereby fully acquitted and absolved. He is not responsible for the subsequent fate of the sum and is not bound to inquire whether it comes to the hands of the person entitled to it, or is lost, wasted, or embezzled in the bank. As he is under no liability of this description, so it follows that he has no right of action against the bank if it fails to pay over properly. The whole business is completed, so far as he is concerned, by his payment and the contem-

[1] Tinkham v. Hayworth, 31 Ill. 519.

[2] See remarks per Lord Loughborough in Shiells v. Blackburne, 1 H. Bl. 158; the analogy is sufficiently strong to make this case an authority for the doctrine of the text.

[3] The question who may, as principal, hold the bank, as agent is discussed hereafter, pp. 326, 341.

poraneous surrender, cancellation, or destruction of the evidence of his debt.[1]

The only method which suggests itself by which the collecting bank can become in some sort the apparent agent of the debtor upon the paper is one which occurred in New York, and there led to a lawsuit.[2] It was as follows: A. made his promissory note, payable at the C. bank on July 12. Shortly before this date he procured from the G. bank, which had a credit on account with the C. bank, a check upon the C. bank, which he forwarded to that bank for the purpose of meeting his note. The check came to the hands of the cashier at the C. bank, July 8. The C. bank failed, July 10. The note was presented there for payment, July 12, when payment was refused. The court held that the cashier of the C. bank was the agent of A. for the purpose of procuring the payment of his note by means of this check: that the circumstances of its receipt by the cashier operated to effect no assignment of funds in the C. bank in favor of A., and that he had no preferred claim against its assets. In this case not strictly the bank, but the cashier, was the agent of A. The loss fell wholly upon A. For having bought a check from the G. bank which was still good when it reached the C. bank, he could not of course look to the G. bank for any reimbursement. He took the risk of the solvency of the C. bank during the interval which must elapse before his note ought to have been presented, and also of the accuracy and honesty of the conduct of that bank, or of its cashier, in appropriating the check, or the credit or proceeds which he was entitled to thereupon, to the payment of his note. A miscarriage in any of these risks was his individual loss.

A note given in charge to a bank for collection, and so indorsed as to place the apparent and technical title in the bank, if not withdrawn after non-payment and protest, may be sued upon by the bank in its own name. But unless specially so

[1] Smith v. Essex County Bank, 22 Barb. 627.
[2] Chapman v. White, 2 Seld. 412.

instructed it is not the duty of the bank to bring suit under such circumstances. It would seem therefore that its doing so will be purely a gratuitous undertaking upon its part, for which it might perhaps be allowed its actual and necessary disbursements, but certainly nothing more in the way of compensation for its trouble in attending to the proceedings.[1]

Duty of Bank to Holder: I. *Where Collection is to be in same Place where Bank is situated.*

The duty of the bank to the holder of the paper which is received for collection differs slightly according to the character of the paper and the place where it is made payable. First in order will be considered those collections which are to be made in the same place where the collecting bank itself is situated. For the purpose of this discussion it makes no difference whether the bank is itself the owner; or has come by the paper directly from the hands of the owner or his agent; or has received it from a correspondent of its own in some distant place. The only conditions are that the bank performing the actual collection be situated in the same town where is also the person who is bound to make the payment or the banking-house at which, by the terms of the instrument, payment is to be made. If the paper be a promissory note, a bill of exchange or a draft, the duty of the collecting bank is comparatively simple. It must perform the ordinary requirements in the way of presenting for acceptance if the paper ought to be accepted, and of presenting for payment at maturity. But the bank is not liable for neglecting to present a draft, where presentment is not necessary for charging any of the parties and must therefore be legally useless, even if made.[2] If either acceptance or payment is refused, the paper must be sent to a notary for protest, provided there is any occasion for having it protested at all. Though if the person from whom the

[1] Sterling v. Marietta & Susquehannah Trading Co., 11 Serg. & R. 179.

[2] Mobley v. Clark, 28 Barb. 390; West Branch Bank v. Fulmer, 3 Barr, 399.

bank received the paper is immediately accessible, there seems to be no reason why the bank should not be allowed at once to return the paper to him and leave him to have it protested, if he sees fit. Though in such case it is essential that the return can be, and in fact is, accomplished with sufficient despatch to leave him reasonable time for attending to the protesting before it is too late to secure its advantages. Probably it would have to be upon the same day.

Where the instrument received for collection is a check the duties of the bank become somewhat more complicated, at the same time that a more correct understanding of them is rendered vastly more important by reason of the immense amount of business of this description which all banks are obliged to transact. Every bank of deposit in the country is wont daily to receive from its customers upon deposit for their credit great numbers of checks drawn upon other banks;[1] though it will be remembered that the present discussion is confined to those cases where the drawee-banks are in the same city or town as the receiving bank. In the case of every deposit of this nature the bank makes itself the agent of the depositor for the collection of the check. If circumstances should cause the obligation in any particular transaction to run to any person or party other than the one from whom the bank receives it, the nature of the obligation is not thereby substantially affected; especially it can never be increased. The duty of the bank is still precisely the same duty, though it may prove that a true owner, not at first known to the bank, is the party who is really entitled to claim a performance of that duty or damages for its breach. For the sake of brevity we will hereafter designate the person, whoever he may be, to whom the obligation of the bank runs, as the depositor or the customer. It is necessary in the outset thoroughly to disembarrass the relation of the bank to the customer, and con-

[1] For cases where the check is drawn upon the same bank in which it is deposited, see p. 320, *et seq.*

sequently the whole matter of the duties and liabilities of the bank in the premises, from two wholly distinct and alien subjects, to wit: The relation of the payee, owner, or holder of the paper to the maker, drawer, or acceptor thereof; and the relation of the party giving it in charge to the bank to any other person standing earlier in the progression of title. With the two last mentioned considerations the collecting bank has nothing whatsoever to do; it may ignore them utterly; in fact oftentimes it may even be incumbent upon it to ignore them utterly, for they may be rendered by circumstances in any particular case inconsistent with its own different, peculiar, and wholly independent obligations in the business.

The reiteration of this doctrine must be pardoned by reason of its importance. The common law, speaking through a great multitude of decisions, has laid down the rules which govern the presentment of checks as between the drawer, the indorsers, and the various subsequent holders; and there is complication enough in the topic. The common law has in like manner laid down the principles controlling the presentment of checks by a collecting bank as between the bank and the depositor; and in this topic also there is independent and ample complication. The entanglement of the two would result in a senseless and inextricable confusion. If then one deposits a check in a bank there is a certain time within which the bank is bound to that depositor to present the check to the drawee for payment. It may be that a presentment before that time would be necessary to enable the payee to hold the drawer, or the holder to hold his indorser, in case of non-payment; or it may be that presentment after that time would suffice for both these purposes. Neither of these facts modify or affect the time within which the bank is bound to its customer to present. By the ordinary rule of common law this time is until the close of banking hours on the business day next following that on which the bank comes into possession of the check.[1] This is

[1] Byles on Bills, p. *20; Boddington v. Schlencker, 4 B. & Ad. 752; 1 Nev.

the general rule and of course is liable to occasional modifications, which will be noticed hereafter.

It may be well to illustrate the principles above laid down; for they are fundamental and important. A. and B. are both living in the same town, and keep their bank accounts at the C. and D. banks respectively, also in the same town. A. gives his check upon the C. bank to B. on Monday. B. deposits it in the D. bank on Tuesday. D. bank presents it for payment to C. bank on Wednesday. In this case the D. bank will have done its full duty by B. under the rule of the common law above laid down. It will have presented for payment on the day after it received the check. So if the C. bank were paying checks all day Tuesday, but stopped payment on Wednesday morning, B. would have no remedy against D. bank for laches or neglect of duty. Neither could he look to A.; for A. had a right to have payment of his check demanded upon Tuesday, and the depositing it in the bank could not be allowed to extend his risk over Wednesday also. If A. did not wish, or was not able, to deposit on Monday he should either have made demand himself on Tuesday instead of depositing, or he should have deposited under a special agreement with his bank that it was either to demand payment on Tuesday or else itself to assume the risk of the customary postponement till the following day. In like manner if A. and B., and their respective banks, were in two distant towns, and A. delivered or sent to B. his check, the common law would declare in what manner and within what time B. must despatch his check to the C. bank for payment. The cases generally are to the effect that this should be done by mail, and at the very latest by the second mail which goes out after B.'s receipt of the check.[1] But this

& Man. 540; Alexander *v.* Burchfield, Car. & M. 75; 3 Scott, N. R. 555; 7 Man. & Gr. 1061; Hare *v.* Henty, 10 C. B., N. S. 65; Rickford *v.* Ridge, 2 Campb. 537; Moule *v.* Brown, 4 Bingh. New Ca. 266; 5 Scott, 694.

[1] We do not propose to go into the discussion of this, or of any other rules governing questions which arise between the drawer and payee, or between either of these parties and the indorsers. This branch of the topic finds its

is the rule as between A. and B. only, and the breach of it would only operate to imperil B.'s right of action against A. But if B. deposits in his bank, his bank has the right to forward the check to the C. bank through its wonted channel of correspondence; and it is not ordinarily obliged to start it upon this progress until the day after it receives it. In like manner each bank in the chain of progress has a right to delay forwarding until the business day next following the day of its own receipt. So if C. bank and D. bank are in two provincial towns and D. bank has no correspondent in the place where C bank is situated, it may send to its correspondent in the nearest large town or city whose facilities for collecting from C. bank are, or might reasonably be supposed to be, greater and more available. This course of proceeding on the part of B.'s bank may be perfectly sufficient as an acquittance of its duty and liability to B. Yet it may also be perfectly consistent with B.'s loss of his remedy against A. in case payment of the check should be lost by reason of its arriving at C. bank later by this process than it would have arrived if sent according to those ordinary requirements of the common law which govern the relations of drawer and payee. It will be seen therefore that the deposit of a check in the holder's bank for collection may in a certain conjunction of circumstances result in his total loss of the amount, without any right of action against any person or corporation for reimbursement. Several facts must combine, it is true, to produce this conjunction, to wit: first the presentment by the collecting bank to the drawee bank for payment must be later than it would have been, had the ordinary rule of presentment as between drawer and payee been followed; second, it must appear that the check would have been paid had it been presented within the time set by this rule, or at least, that the bank was paying during that time, and that the drawer's account was good for the sum

proper place in the works on Bills and Promissory Notes. We shall confine ourselves strictly to the controversies in which the banks may become implicated.

called for; third, payment must be refused, and the refusal must be by reason of the failure of the bank occurring subsequent to such time and before actual presentment; or by some other like reason beyond the control of the drawer.

But the common rule giving the bank the whole of the day following its receipt of the check is liable to be materially qualified through various causes. The time may be shortened or extended either 1, by express instructions given by the depositor, or an express understanding had between him and the bank, in reference to the particular transaction;[1] or, 2, by the uniform course of dealing previously pursued between himself and the bank in the conduct of similar business, and which must therefore be assumed to be a tacit contract between them for the regulation of all such transactions; or, 3, by the known usage of the individual bank in such matters, provided the usage is one which the courts can properly sustain, upon a comparison of all its features and with those obligations which the bank cannot avoid by any means short of a distinct agreement; or 4, by the general usage of banks and custom of the banking business in the city or town where the bank is situated. If any two of these standards of legality are simultaneously offered to govern a disputed case, and are found to clash, precedence in power of control must be accorded to the one or the other according to the order in which they have been named. The two first rules, the special agreement, or a distinct and peculiar system established for dealing with an individual depositor only, must of course be comparatively of very rare occurrence. One or other of the two last-named principles will be looked to for the solution of the great bulk of controversies. The depositor may or may not have been at the pains to inform himself precisely what system his bank has adopted for making its collections upon checks received by it,

[1] In New York, "peculiar circumstances" together with the *knowledge and concurrence of the depositor* were held to justify a delay in presentment by the collecting bank. Jacobsohn *v.* Belmont, 7 Bosw. 14.

drawn against other banks in the same place. If it is a tolerably large or busy place, the chances are that there will be a clearing house or similar institution, and that the depositor will positively know or will justifiably take it for granted, that his bank uses this channel. But it is not essential that he should inquire or know any thing whatsoever upon the subject; he may be content to put a perfectly blind confidence in the propriety and sufficiency of his bank's arrangements for this business, and still his legal rights will remain precisely the same. He is still entitled to expect and require of his bank that it shall not capriciously or needlessly deviate from the established system, whatever that may be; and if it does so deviate and a loss is the result, he may look to the bank for compensation. For example if the bank neglects to send the check through the clearing house at the customary time and in the ordinary manner, and elects rather to keep it till a later hour and present it at the counter; then, if it would have been paid through the clearing house but is refused at the counter, this conduct of the bank, being contrary to its wont in such business, will render it liable to the depositor of the check for its amount.[1] But the bank must always make the presentment directly to the drawee, and cannot send it through other banks or agents of any description, presentment through the clearing house being for this purpose a presentment direct to the drawee. There can be no real necessity for the employment of any intermediate agencies, where the collecting bank and the drawee bank are both in the same place. If the collecting bank, without distinct permission, sees fit to have recourse to them, it does so at its own risk of all the consequences which may result.[2] This rule of course does not operate to abridge the rights of banks to make any of those transfers of debits and credits among themselves in the course of clearing which usage has introduced for the purpose of

[1] Boddington *v.* Schlencker, *ubi supra;* Alexander *v.* Burchfield, *ubi supra.*

[2] Moule *v.* Brown, *ubi supra.*

facilitating the settlement of their mutual accounts in the most convenient manner.

"Crossed Checks" to be paid only through Clearing.

In England it has been intimated, if not directly decided, that if the payee of the check had stipulated with the drawer that the name of the payee's bankers should be "crossed" on the check, this would have amounted to an agreement by the drawer that the usual course of presentment of the check through bankers might be followed. In such case if this method involved a delay greater than the law ordinarily allows as between drawer and payee, the former would nevertheless not be acquitted by the failure of his bankers before presentment, though they had continued to pay through the whole period of time which the payee would otherwise have been entitled to for presentation.[1] To use again the illustration of p. 328, *ante*, if A. had "crossed" his check with the name of B.'s bankers, B. could have held A. in the supposed case of the failure of A.'s bankers on Wednesday and of a presentment by B.'s bankers later in the same day, if made according to the ordinary usage in their business. In this country the system of "crossed checks," strictly so called, is unknown. But of late the germ of a similar custom has begun to manifest itself. Occasionally checks have stamped or written upon them some form of words which is intended to secure their payment exclusively through the clearing house. No especial form has as yet been generally accepted, and the legal effect of none of those in use has ever been passed upon. It is safe to say, however, that there is no question but that the drawer could embody in his order a direction to his bank to pay only upon presentation of the instrument in the usual course through the clearing house, and that such a direction would be as valid and as binding upon the bank as a direction to pay only to the order of a particular person. Probably the drawer of the check

[1] Alexander *v.* Burchfield, *ubi supra*.

is the only person who could legally impose this duty upon the drawee bank, for he is the only person who has a right to give to the bank any orders in the premises. Though if the check be payable to the order of A. B. it is barely possible that the privilege of including this matter in his order when indorsing over might be accorded to A. B. also. In all cases it may be laid down that the words used should be intelligible, which certainly is not the case with many of the forms hitherto adopted. The mere crossing with the name of a banker is a species of mark which derives its meaning through the interpretation of usage. But if words which assume to have a signification are used, they must succeed in expressing with some degree of clearness that meaning which is desired, or they will not be construed to import it. Especially must this be considered to be the case at present, since it can hardly be doubted that no custom sufficiently old or sufficiently universal to be regarded as a legal usage has yet been established in this matter in the United States. Supposing the direction to be properly given, however, the collecting and the paying bank must both respect it, and the English cases above mentioned would be precedents directly in force. It would amount to an express designation by the drawer of the manner in which alone he authorized payment to be demanded or made; and assuredly he could be released from no liability or obligation by any circumstances naturally occurring in the ordinary process of carrying out his own bidding. There seems to be no authority for supposing that any thing short of this unmistakable action on the part of the drawer would be held to operate as a waiver by him of his customary privileges. The mere remark of the payee that he shall not deposit till the day following may convey information to the drawer of the payee's intent; but it calls for no answer and creates no obligation. The payee himself is not bound by it as an agreement, and the drawer is not affected by it in any manner whatsoever. He neither gains nor loses any rights by reason of it.

Where the Bank of Deposit is also the Paying Bank.

No demand is necessary where a note is payable at the bank in which it is deposited for collection. It is enough if the note is in the bank on the day named for payment there.[1]

A note was made payable to a certain bank or order, as if for discount by that bank. It was not discounted there, however; but was sold to another party, who deposited it in the bank. It was held that the sureties were liable to pay it.[2]

Sending a check by post to the drawee is a good presentment; but if the money does not come back by the return mail, notice of dishonor should be given.[3]

If a bill of exchange is presented through a banker, one more day is allowed for *giving notice of dishonor*, than would be allowed if it were presented by the party himself. But no additional time is allowed for *presentment for payment*.[4]

Rules which the Collecting Bank is bound to Observe.

The collecting bank must be governed in all matters concerning the time and mode of presentment, demand, and notice, by the laws and customs which prevail in the place of its own situation. If the paper has been transmitted from a distant place, where the laws and customs are different, the transmitting party, if he wishes these to be conformed to, must send special instructions to that effect. In that case the collecting bank, if it undertakes the collection, will be bound, at its own peril, not to deviate from the course thus prescribed; though in the absence of express directions it would not be bound to inquire into, nor probably would it even have the right to recognize, if it knew, the laws or usages of any place other than its own. The understanding which is assumed to be mutual and

[1] Goodloe *v.* Godley, 13 S. & M. 233.
[2] Ward *v.* Northern Bank, 14 B. Monr. 351.
[3] Bailey *v.* Bodenham, 10 L. T., N. S. 422; 12 W. R. 865.
[4] Alexander *v.* Burchfield, Car. & M. 75; 3 Scott, N. R. 555; 7 M. & G. 1061.

to enter into the contract of the parties, is that the bank shall perform the various acts which are embraced in the business of collection, in every respect according to the method which it is wont to pursue, in accordance with the local law, rules, and regulations.[1] Evidence of the habitual course of dealing, provided it be not incurably illegal, is admissible, not as amounting to rules of judicial decision, but as evidence of the contract.[2] The assent of all concerned to the pursuance of this course of dealing and their waiver of any strictly legal claims which they might have in contravention or variation thereof, becomes then an implication of law. All the parties upon the note are equally bound by this implication, though they have had nothing whatsoever to do with the paper at the time of its being deposited for collection, and so were not by immediate personal action parties to this portion of the proceedings, or able to influence or control them.[3] They are bound and concluded by the act, and the legal implications arising from the act, of him who has become the holder, and who has the right to put the note in the ordinary business channel for collection. Thus if demand is made upon a note upon the day before or the day after it falls due, according to the established custom of the collecting bank, or upon the fourth day after maturity, under a local custom to allow four days of grace instead of three, the maker and the indorsers will be held and cannot set up insufficiency or irregularity in the demand.[4] So a custom of a bank to hold the indorser without having first

[1] Lincoln and Kennebec Bank *v.* Page, 9 Mass. 155; Chicopee Bank *v.* Eager, 9 Met. 584; Hartford Bank *v.* Stedman, 3 Conn. 489; Bowen *v.* Newell, 5 Sandf. 326, and all the cases cited below in the discussion of this topic.

[2] Blanchard *v.* Hilliard, 11 Mass. 88; Jones *v.* Fales, 4 id. 245; Widgery *v.* Monroe, 6 id. 449; Renner *v.* Bank of Columbia, 9 Wheat. 581; Yeaton *v.* Bank of Alexandria, 5 Cranch, 49; Bank of Columbia *v.* Fitzhugh, 1 Har. & G. 239; Hartford Bank *v.* Stedman, 3 Conn. 489.

[3] Pearson (Brent's Ex'rs) *v.* Bank of Metropolis, 1 Pet. 89.

[4] Patriotic Bank *v.* Farmers' Bank, 2 Cranch, C. C. 560; Bank of Columbia *v.* Magruder, 6 Har. & J. 172; City Bank *v.* Cutter, 3 Pick. 414; Yeaton *v.* Bank of Alexandria, 5 Cranch, 49.

sued the maker, though he is solvent, is good.[1] So likewise a custom to make demand on the maker of a note lodged in a bank without presenting it to him.[2]

Knowledge of the usage, either express or implied, must, it has been said, be brought home to the parties who are to be bound by it.[3] But other cases of high authority declare that the usage of the bank in collections will bind the persons dealing with it in this business, whether such usage be known to them or not;[4] and this is certainly the correct rule. Indeed, the opposing cases can be easily reconciled by the link which appears to be suggested in one of them. The fact that one deals with the bank without taking the trouble to inquire as to its system, will raise the implication that he already knows and is satisfied with that system. It is clear that if a person hands over a note to a bank for collection without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course, and to retain him till the whole theory has been expounded to him, when his conduct unmistakably shows that either he already knows it or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank, at his own deliberately assumed risk of its sufficiency. In such a case the bank not only has a right to assume, but it is even positively bound to assume, that his desire is that the ordinary and established usage be pursued. An unordered deviation from that usage, though the usage were unknown to him, would lay the bank open to his suit for damages; and the court must, as has been already shown, rule

[1] Renner v. Bank of Columbia, 9 Wheat. 581.

[2] Pearson (Brent's Ex'rs) v. Bank of the Metropolis, 1 Pet. 89; Raborg v. Bank of Columbia, 1 Har. & G. 231; Whitwell v. Johnson, 17 Mass. 452; City Bank v. Cutter, 3 Pick. 414.

[3] Mills v. Bank of United States, 11 Wheat. 431; Peirce v. Butler, 14 Mass. 303.

[4] Smith v. Whiting, 12 Mass. 6; Bank of Washington v. Triplett, 1 Pet. 25; Dorchester and Milton Bank v. New England Bank, 1 Cush. 177.

for him as matter of law that the pursuance of this custom was an implied item of the contract. It is clear, then, that he could not plead ignorance of it in order to lay a foundation for a suit against the bank for acting according to it. The knowledge on his part would be implied conclusively.[1]

Whenever it may be necessary to prove knowledge by an individual of the usage of a bank, proof of one transaction having been previously conducted between them in accordance with that usage is sufficient.[2]

Usages in Collection.

It has been seen that the time when demand must be made may be modified by proof of usage concerning the local rule of grace. In like manner proof of a particular usage concerning the place at which demand shall be made, in default of the designation of any place in the instrument itself, is admissible and may be conclusive. Thus where a customer lived at a distance from his bank and was wont to draw his notes "negotiable at" the bank, it was held, that it was a proper case for the introduction of evidence of a custom to make presentment and demand upon his notes only at the bank; which custom if sufficiently proved would justify the collecting bank in presenting and demanding in compliance with it.[3]

But the usages which can be shown are solely those which qualify some portion of those proceedings which the bank is obliged to undertake for the immediate purpose of effecting the collection. It is only the points of detail or the *methods* which the bank pursues in presenting, demanding, and notifying that can be thus modified. No usage will justify the actual omission of any of these substantial and material acts, nor the

[1] See the chapter on Usage in which this subject is further discussed and important cases are cited and discussed, showing upon what grounds knowledge of the usage and custom of the banks will be conclusively inferred at law.

[2] Dorchester and Milton Bank *v.* New England Bank, 1 Cush. 177

[3] 1 Pet. 89, *supra*.

substitution of any other act as an equivalent for any of them. The act must be distinctly done; it is only in reference to the manner of doing it, as regards time and place and the like considerations, that the rigidity of the general doctrines of the law may be slightly deflected by the force of local rules. Thus though, as has been seen, demand may be made a day or two earlier or later than the usual third day after the literal maturity of the paper, yet demand must be made, and it must be a real *bona fide* demand. No usage can be allowed to substitute a notification to the makers of the time and of the place where the paper is deposited for collection, in place of the positive demand of payment which the law imperatively requires.[1]

Notice of Dishonor.

Where a bank, not upon its own account but as agent for collection, holds indorsed paper of any description, which is dishonored, it has been questioned to whom it is bound to give notice of the dishonor—whether only to its own principal, that is to say, the party from whom it received the paper, or to the makers and all the indorsers thereon. The decisions have not from the outset been perfectly harmonious. But the doctrine that the duty extends to the notification of any persons behind the party recognized by the bank as its immediate principal is comparatively weakly supported. The chief authority is the New York case of Smedes *v.* The Bank of Utica.[2] But in this case there was evidence, which the court deemed satisfactory, of an established custom and general understanding to this effect in New York, and it was strictly upon this evidence that the decision was really based; though the judge intimated that, if this proof had been omitted, it was possible that the court might have taken judicial cognizance of the usage. Thus this ruling really is entitled to no weight in a discussion of the

[1] Farmers' Bank *v.* Duvall, 7 Gill & J. 78.
[2] 20 Johns. 372; 3 Cow. 662.

general principle of the law, and even the judge's remark serves only to show how universal and notorious was the usage in his own State, and has not at all, and does not communicate to the ruling, the character of a general principle. The language of the court in a few other cases, more especially in McKinster *v.* Bank of Utica,[1] Fabens *v.* Mercantile Bank,[2] Bank of Washington *v.* Triplett,[3] and West Branch Bank *v.* Fulmer,[4] has been regarded as sustaining the same view. The language used might induce the citation of these causes as authorities, but they can serve only as very weak ones, and perhaps it would hardly be an unfair statement to say that so far as they bear upon this precise point they contain little, if any, more than *obiter dicta*.[5] On the other hand the authorities which take the opposite view are numerous, direct, and weighty.[6] Among them, as cited in the margin, it will be noticed that there are other cases decided in New York, and especially should be noted one, later in date than any of those to the contrary effect occurring in the decisions in the same State. The court acknowledge that the question: whether, where the note is sent for collection merely, it is a presumption of law that the collecting agent will notify *all* parties, is one of much embarrassment, and not clearly settled in New York. Previous cases in the State, being those just cited, have arisen between a holder and an early indorser, and concern the point whether such indorser could be held by virtue of a series of notices sent day by day by each indorser in turn to his predecessor.

1 9 Wend. 46; 11 id. 473.

2 23 Pick. 330.

3 1 Pet. 25.

4 3 Barr, 399.

5 See also Curtis *v.* Leavitt, 15 N. Y. 9; Montgomery County Bank *v.* Albany City Bank, 3 Seld. 460; and Foster *v.* Essex Bank, 17 Mass. 479.

6 State Bank *v.* Bank of the Capitol, 41 Barb. 343; Bank of United States *v.* Goddard, 5 Mason, 366; Phipps *v.* Milbury Bank, 8 Met. 79; Colt *v.* Noble, 5 Mass. 167; Eagle Bank *v.* Chapin, 3 Pick. 180 (see comments upon this case, made by the court in Phipps *v.* Milbury Bank, *supra*); Mead *v.* Engs, 5 Cow. 303; Howard *v.* Ives, 1 Hill, 263; Spencer *v.* Ballou, 18 N. Y. 327; Farmers' Bank *v.* Vail, 21 id. 485 (cited in 41 Barb. 343, *supra*); Bank of Mobile *v.* Huggins, 3 Ala. N. S. 206; BranchBank *v.* Knox, 1 id. 148. So the English case of Haynes *v.* Birks, 3 Bos. & P. 599. See also Bank of United States *v.* Davis, 2 Hill, 451.

But the discussion has never arisen directly between the holder and the collecting agent, where the right of the former to recover from the latter has turned upon whether or not the latter had contracted, as part of his undertaking to collect, to notify all the indorsers. After a careful consideration of all the precedents, the court conclude that the collecting bank need notify only its own principal, from whom it has immediately received the paper. In the case cited from Mason's Reports the matter is subjected to a very thorough and satisfactory discussion, as it is also in the case of Phipps *v.* The Milbury Bank. Where the weight of opposing authorities is so very disproportionately balanced, and especially where the latest among the authorities all consistently incline in favor of the doctrine which was already the stronger, it can hardly be considered that the true rule is any longer open to doubt. It must be assumed now to be law that the notification to the principal, *i. e.*, to the immediate predecessor in possession, to the party from whom the bank receives, no matter what may be the nature of the title or interest of that party to or in the paper, is sufficient to acquit the bank. But though this is settled as the general rule, it is of course open to material variation from extrinsic causes. A special agreement, express or implied, between the bank and its principal may require notice to be given to all the parties, or to any particular party, on the paper. So a local usage, or the usage of the collecting bank, to notify indorsers or makers, may render it obligatory upon the bank to do so, as a part of the contract of collection. There can be no question that the court in the case of Smedes *v.* Bank of Utica was right in admitting evidence of such usage; and, of course, also in being governed by it since it was sustained by satisfactory proof. None of the cases in which this decision has been since commented upon, and which in the absence of proof of usage have laid down an opposite doctrine, have criticised the correctness of the course then pursued in this matter. On the contrary they have by plain implication approved of it. It should seem

too that the bank ought to choose distinctly between the two courses. For if it undertakes to notify all the parties, and does not do so properly, it is at least possible that it might be held responsible for the loss arising from the insufficiency. Certainly the fact of its undertaking to notify all would be very strong evidence that the notification of all was understood to be a part of the contract. Indeed it has been held that the fact of notification to a part only of the indorsers was admissible in evidence, as going to show an agreement to notify all, and the court only restricted its force by saying that it was not conclusive to this effect.[1]

Defaults of the Bank.

It seems hardly necessary to state, what is the natural and necessary inference from the doctrines and cases already given, that if any breach or neglect on the part of the bank occurring in any portion of its duty in the task of collection results in any loss to any party interested in the paper, whether his name appears thereon or not,[2] such party will have his right of action against the bank to recover reimbursement or damages for the injury. The measure of damages will be the amount of actual loss which he has sustained.[3] It will be no defence for the bank to assert that it was not accustomed to undertake collections, and that the error arose from its want of familiarity with the ordinary course of proceedings. Having undertaken the business, it is liable for the results of an improper performance of it.[4] It has been already stated that the bank cannot set up want of consideration.[5]

It has been held also that where a bank demands and receives payment of a dishonored note from an indorser, and he seeking

[1] State Bank *v.* Bank of the Capitol, 41 Barb. 343.

[2] McKinster *v.* Bank of Utica, 9 Wend. 46; 11 id. 473.

[3] Bank of Washington *v.* Triplett, 1 Pet. 25; McKinster *v.* Bank of Utica, 9 Wend. 46; Tyson *v.* State Bank, 6 Blackf. 225.

[4] Ivory *v.* Bank of State of Missouri, 36 Mis. 475.

[5] Halls *v.* Bank of the State, 3 Rich. 366.

in his turn to recover from a prior indorser, fails to do so by reason of a default by the bank in not making a proper demand upon the maker, which insufficiency was unknown to the paying indorser when he made the payment, he shall recover back the amount of his payment from the bank.

For whose Defaults the Bank of Deposit is liable.

We must now approach a topic wherein will be encountered a diversity of opinion which is utterly irreconcilable. Positions fairly adverse to each other have been assumed, marked by no signs of yielding on the part of either contestant. Beyond this honest discrepancy a further vexatious complication is introduced by the use in some decisions, delivered by high tribunals, of such dubious language that it is positively impossible to know precisely upon which side to rank them, or even whether they really ought to be ranked upon either side, and should not rather be formed into a group and class by themselves. This confusion grows out of the process of transmission through banks situated in various different places of paper which is payable in a town other than that in which the holder resides and in which the bank of deposit transacts business. The question concerns the duty and liability of the several banks preceding in the chain of transmission the last one which has to effect the actual collection. Thus if A. living in Portland holds a note payable in New York and deposits it in his bank in Portland for collection; the bank in Portland forwards it to its correspondent bank in Boston, which in turn forwards it to its correspondent bank in New York city, where finally the collection is to be made. The question then is whether or not the Portland bank has so far fulfilled and discharged its duty to A. by the due and sufficient transmission of the paper on its course for collection, that it is thereby freed and absolutely relieved from all liability for defaults subsequently occurring in Boston or in New York; or whether, on the other hand, the Boston and New York banks and any notary or other agent

employed by the last bank in the business of collection, including notarial demand and protest, if made, are all sub-agents of the Portland bank, in such a sense that the law of agency rendering it, as principal, liable to answer for any and all their defaults will govern in the case. Precisely the same also is the question whether a bank which has given dishonored paper into the hands of a notary for the purpose of having him take the ordinary and necessary steps in the way of presentment, demand, protest, and notice is liable for a loss occasioned through his neglect or improper performance of his duty.

Those authorities which hold that the bank first receiving the paper is answerable for the conduct of any and all the subsequent agents, be they banks or notaries, base their decision upon the old and strict principle in the law of agency, that the first agent is liable for the acts of all the sub-agents employed by him. They urge that the bank is employed to perform the task of collection in any manner that it may see fit, trammelled by no restrictions or directions whatsoever as to the persons or corporations whose services it shall employ, if it does not wish itself to attend to the whole transaction. This task the bank undertakes to do. If it chooses to use the medium of sub-agencies it selects those which it prefers and is free to trust them more or less, and to instruct them as it chooses. They are directly its own agents and employees, and both law and justice demand that it should answer for their conduct to its own principal. If any bank is unwilling to run the risk of the accuracy of its correspondents, or of the notary it or they may select, it is free to refuse the business of collection either altogether, or in distant places, or without a distinct understanding that its liability shall be limited to the accuracy and sufficiency of those acts only which shall fall to itself to perform. This is the view which must be now considered as conclusively adopted in the States of New York and Ohio.

Even in New York the earliest instinct and tendency of the courts was to absolve the first bank from all liability for de-

faults of subsequent banks or notaries. In Smedes *v.* The Bank of Utica,[1] the court held that if the collecting bank employed a notary for protesting, he being a sworn public officer, and therefore presumably a fit, competent, and proper person for this function, it was fully exonerated from liability for any results of a default on his part. The next case which arose was that of Allen *v.* The Merchants' Bank.[2] A bill of exchange payable at a distant place was deposited in the defendant bank for collection. The bank forwarded it to a bank in that place; which second bank put it into the hands of a notary to present for acceptance. His failure to give notice of the refusal to accept caused a loss. The first trial was in the Supreme Court, and there it was said that the defendant bank undertook only to forward to proper parties for collection; that if the bank to which it forwarded, or the notary employed by that bank, or other subsequent party, committed a default, the depositor must look to them; they became his agents directly and could be held by him; but this defendant bank was not responsible to him for what happened after the forwarding. The cause was carried by appeal before the Court of Errors, and the decision of the Supreme Court was there reversed. But it was reversed by a small majority; fourteen senators, as we understand the report, voting for the reversal, and ten being in favor of sustaining the decision of the lower court. The case excited much interest, and all the arguments which could be conceived on behalf of either side were gathered and put forward in their most forcible shape. Senator Verplanck delivered the opinion on behalf of the majority. Chancellor Walworth spoke the views of the minority. A cause so thoroughly considered was regarded as conclusively settling the law in the State of New York. Efforts were made in subsequent cases to obtain an overruling, but they were of no effect. All subsequent cases[3]

[1] 20 Johns. 372; 3 Cow. 662.
[2] 15 Wend. 482 (Supr. Ct.); 22 Wend. 215 (reversal in Court of Errors.)
[3] Donner *v.* Madison County Bank, 6 Hill, 648 (by implication, supports 22

have consistently upheld the doctrine of Senator Verplanck and his thirteen coadjutors, and the question can be no longer considered an open one in New York. Though it should perhaps be added that some eminent judges, while they have stated that they considered the question as *res adjudicata*, which it did not lie with them again to open, have used language which was doubtless intended to intimate that the adjudication was not wholly satisfactory to them.

The court in Ohio acknowledged itself, after a review of some of the chief authorities, to be "rather bewildered by the conflict, than aided;" but considering the question an open one, it preferred on the whole to follow the principle finally adopted in New York.[1] This court also took the ground of the House of Lords in Mackersey *v.* Ramsay (*supra*), though here there was no such special agreement as to the time when credit was to be given to the owner, as there was in that case. They say that payment to the collecting bank is payment to the first bank, and so soon as the payment is received by such collecting bank, the first bank becomes at once the debtor of the owner of the paper to that amount.

With this case we come to the end of the decisions which support this doctrine in the controversy. It remains to state the arguments of the supporters of the contrary view, and to note the authorities which sustain it. Upon this side it is considered that the bank undertakes only to transmit to a reputable and proper agent either in the place where the collection is to be made or in the place nearest thereto where it has a correspondent or an agent whom it thinks fit to employ for the purpose of forwarding. So if the services of a notary become requisite, the undertaking of the bank is limited only to the employment of one whom it has reasonable ground to consider acquainted with the business to be done by him, and punctual

Wend. 215); Montgomery County Bank *v.* Albany City Bank, and Montgomery County Bank *v.* Bank of State of New York, 3 Seld. 459; Commercial Bank *v.* Union Bank, 19 Barb. 391; 1 Kern. 203.

[1] Reeves *v.* State Bank of Ohio, 8 Ohio St. 465.

and thorough in its execution. The person giving the note to the bank knows perfectly well that the bank will have to employ an agent in the distant place, or for the purpose of protest. He anticipates the employment of such sub-agents, and Chancellor Walworth acknowledging that the general rule is that the first agent is responsible for the sub-agents subsequently employed by him, yet says that where the employer knows the necessity of employing sub-agents and expects his agent to do so, exceptions to the general rule are sometimes allowed, and he regards this business of collection as a matter which it is peculiarly appropriate to admit among these exceptions. The customer expects, or ought to expect, that the bank will pursue the ordinary course of business in such matters; and this usual course is well known to be simply the transmission to another agent in good repute. Ordinarily when there is any commission paid for collection it is a very small one; but probably in the great majority of cases the business is wholly gratuitous, and the consideration is only that slight and indirect one which arises from the anticipation of having the use of the money collected for a few days, or from the manifestation of a willingness to oblige customers. Such considerations may well be regarded as sufficient for the mere task of transmission; but it is impossible that they should be sufficient to sustain an agreement to be further responsible for the solvency and good conduct and thorough performance of their duties on behalf of all subsequent banks and notaries or other agents whom it may be necessary to employ. Such an insurance would call for a high premium. It is incredible to suppose that the bank for a very small possible remuneration, much more for a wholly contingent return in any shape, assumes so great a risk. The ordinary usage of business requires the bank actually to nothing beyond the act of forwarding, and this is all the bank or the customer can be supposed to contemplate as that duty of which the accurate performance is guaranteed by the corporation.

This doctrine has been adopted by the courts of a great num-

ber of the States of the Union, all of which have consistently asserted it from the outset. In Massachusetts it was held, in 1848, that if the first bank selects proper sub-agents for accomplishing the transmission and making the collection, it discharges its full duty and is not liable for their default. If the note has been indorsed over to it generally, it may indorse over to sub-agents in the same form, and need not make a restricted indorsement. In delivering the opinion Judge Wilde said that the final decision in Allen *v.* The Merchants' Bank (*supra*) "is opposed to a number of decisions of great authority, and is not, as we think, well founded in principle."[1] In Connecticut the court said in the first case which they were called upon to consider, that of Lawrence *v.* Stonington Bank,[2] that the *transmittee* bank was the attorney, not the factor, of the transmitting bank, and had for its principal not the transmitting bank itself, but the original holder and depositor of the paper; whence it followed that the defaults of each bank in the order of succession were not the defaults of any predecessor in the transmission, but of the original customer and principal himself. Later the same court declared that a person who deposits in a bank a note which is payable elsewhere must know that all the bank can do is to send it on to a reputable correspondent; and if the bank does this it should be thereby fully exonerated. It would be an unreasonable hardship to hold the bank for the defaults of such further agents.[3] In Louisiana it has been held that the bank does enough, if it gives the note to its regular notary, and is not liable for his default.[4] In Illinois it was said that a bank was not liable for the default of the sub-agent, if it had exercised due diligence in the selection.[5] The same doctrine is adopted by a fair implication in the ruling in the Wis-

[1] Dorchester and Milton Bank *v.* New England Bank, 1 Cush. 177.

[2] 6 Conn. 521.

[3] East Haddam Bank *v.* Scovil, 12 id. 303.

[4] Hyde *v.* Planters' Bank, 17 La. 560; Baldwin *v.* Bank of Louisville, 1 La. An. 13.

[5] Ætna Insurance Co. *v.* Alton City Bank, 25 Ill. 243.

consin case cited in the margin.[1] In Mississippi the bank is declared not liable if it gives the note to a notary in time for him to discharge his duties.[2] In Maryland the first bank is not regarded as liable for defaults of sub-agents, whether banks or notaries; but it is fair to say that the first decision was based on proof of usage in the State, or at least in the city of Baltimore.[3] The same view has not been directly asserted in Missouri; but the tendency of the court may be inferred to be in favor of it from the form of the opinion and the language used in it, which was delivered in the case of Gerhardt *v.* Boatman's Savings Institution.[4]

There remain a few cases in which the courts seem to have inclined to consider that the question whether the duty of the bank was the whole collection or mere transmission is one of fact in each particular case, and that the liability of the bank depends upon which of these duties it is found to have undertaken. But it is to be noted that in all the cases wherein the decisions are founded upon the statement, as a matter of fact in the case, that the bank undertook to "transmit," it is a necessary presumption that this is to be considered to be the undertaking in the absence of proof to the contrary. Of course it must always be open to any customer to prove that his bank actually contracted with him to perform the whole duty of collection, and thereby of course also contracted and agreed to assume all the risks throughout all the stages. Cases therefore which hold that in the absence of proof to this effect the agreement of the bank is only to transmit, and its liability is limited to timely and accurate transmission, in fact support the second view, taken by the Massachusetts and other courts. The remarks of the New York judges, that cases of this description are not precedents upon the general question because they

[1] Stacy *v.* Dane County Bank, 12 Wis. 629.

[2] Tiernan *v.* Commercial Bank, 7 How. (Miss.) 648; Agricultural Bank *v.* Commercial Bank, 7 Sm. & M. 592; Bowling *v.* Arthur, 34 Miss. 41 (1857).

[3] Jackson *v.* Union Bank, 6 Har. & J. 146; Citizens' Bank *v.* Howell, 8 Md. 530.

[4] 38 Mis. 60.

relate to cases where the agreement was only to transmit, is a verbal quibble, and is not a correct statement of those cases. In all the cases alike, the notes are simply placed in the bank to go through the ordinary routine which has for its object and conclusion either payment or protest. No special agreement, beyond this, is shown in any single case to have been made. The fact that some of the cases state that the bank receives for transmission, and that others state that the bank receives for collection, shows no real difference in the circumstances attending the receipts by the different banks. It simply indicates the view which the court takes of the undertaking of the bank, regarding it either as an undertaking to transmit or as an undertaking to collect, according as the judge is influenced by the arguments which persuaded Chancellor Walworth or by those which weighed with Senator Verplanck. The facts are in both cases the same, unless positive proof of an especial agreement out of the common course, and additional to the mere deposit for collection, is shown; which, as has been remarked, appears to have occurred in none of the adjudicated cases heretofore cited. The difference in the language in which the facts are stated is in fact a statement of a difference of opinion on the part of the courts as to the legal aspect, character, or effect of the facts, not of intrinsic difference in the facts themselves.

This explanation will enable the advocates of the second doctrine to add to their above-named authorities the weighty ones of still another and an earlier decision rendered by the Supreme Court of the United States, and of the decisions in the courts of Pennsylvania. This ruling of the former court is contained in the case of the Bank of Washington *v.* Triplett.[1] The court, Chief Justice Marshall delivering the opinion, held that the sub-agents were agents directly of the holder, and that the first bank was not liable for his defaults. It is true that the reporter in stating the facts, said that the bill was

[1] 1 Pet. 25.

placed in the bank "for the purpose of being transmitted." But apparently there was no ground for using this especial language other than that this was the view which the reporter and the court both took of the bank's undertaking. Otherwise, so far as any peculiar facts in proof were concerned, the word "collected" might be substituted for "transmitted." Apparently the paper was given to the bank precisely as all paper is customarily given to banks, when the holder seeks to have the necessary steps for its collection taken. There is no intimation of the occurrence of any circumstance or conversation which took this transaction out of the ordinary course of dealing, or which rendered the duty of the bank a peculiar or restricted one. It must be assumed as certain that this case in fact constitutes a precedent and authority for restricting the liability of the first bank to the simple duty of transmission.

In Pennsylvania, in 1834, the court said: The undertaking of the first bank is clearly to transmit the bills; that this was the intention of both parties must be inferred from the transaction. This bank is used simply as a "medium of communication." If the plaintiff contended that it undertook "*to collect*," that was a material fact which should have been passed upon by the jury. Hence the banks do not stand in the relation of principal and agent towards each other. But the first is the agent for transmission; the second is the agent for collection; *ergo*, the first is not bound to answer for the doings of the second.[1] In 1848 the same view was incidentally adopted.[2] In Bellemire *v.* The United States Bank,[3] the same ground was gone over in both the lower and the highest courts of the State with the same result. The ruling in Mechanics' Bank *v.* Earp, was deliberately repeated and affirmed as being the law in Pennsylvania. It was urged that the bank had undertaken "the whole business of collection," and in proof of

[1] Mechanics' Bank *v.* Earp, 4 Rawle, 384.
[2] Wingate *v.* Mechanics' Bank, 10 Barr, 104.
[3] 1 Miles, 178; 4 Whart. 105.

this it was shown that the paper had been indorsed over to the bank by an unrestricted indorsement. But the court considered that though the bank was holden by such an indorsement, its situation was rendered in no respect peculiar by this fact. It was invested with the apparent ownership only that it might have authority to present for payment. As simple agent it was held only to act in good faith and "according to the regular and accustomed course of the business; and was not responsible though such action might not prove to be to the best advantage." The bank, from its nature, is obliged to employ agents, in this case a notary, who is not alleged to have been incompetent. The owner of the paper in omitting to desire a special agent to be employed, consented to let the matter take the ordinary course, and the bank performed its duty in committing the paper to the hands of the person whom it employed in its own like concerns.

The earliest English case upon the question is that of Van Wart *v.* Wooley,[1] in which bills drawn on a person in London were sent to a person in Birmingham for collection. The court declared that it could not have been reasonably expected by the sender that the holder in Birmingham should himself make the presentment in London; but that it must have been assumed that the agency of some third party would be necessarily resorted to. When this was in fact done and the Birmingham party employed an agent in London who was accustomed to transact such business for himself and others, and on whose punctuality and fidelity he had good reason to rely, he had done all that was incumbent upon him and was not answerable for the subsequent default of his employee. The later case of Mackersy *v.* Ramsay[2] has been sometimes urged as overruling this decision, though it is by no means clear that it is entitled to any such force. In that case there was no default or negligence of the collecting bankers. They actually made the collection, but they failed directly afterwards and

[1] 8 Barn. & C. 489.

[2] 9 Clark & F. 818.

the proceeds never came into the hands of the bankers who originally received the bill from their customer. The undertaking of the latter firm was distinctly expressed in their letter to their customer to be "to forward and to place to his credit, on maturity." For their performance of it they were to receive a commission. The court declared that the receipt of payment by the correspondent, or by the agent of the correspondent, of this firm was in law a receipt by the firm, and that from the moment of such receipt their indebtedness to their customer for the amount accrued, and was not diverted by reason of the subsequent fact of their not actually coming into possession of the collected funds. The case therefore is not parallel to that of Van Wart *v.* Woolley, and does not overrule it. In the proceedings in the House of Lords, Lord Campbell, in the course of the delivery of his opinion, remarked that "if, by *vis major* or *casus fortuitus* the bill had been destroyed" on its way from the first bankers to the collecting bankers, the loss would not have been that of the former. Lord Cottenham also said, in what was obviously only intended as an *obiter dictum*, "If there was any negligence in the conduct of the parties actually employed to receive the money, it could only affect those by whom they were so immediately employed; for certainly they were not the agents of" the customer. But this cannot be assumed to overrule Van Wart *v.* Woolley, which was not mentioned at all and is still cited as expressing the law.

The two cases must be allowed to stand side by side, as in fact they are perfectly capable of doing, without clashing, and the weight of English authority must be added to the already preponderant mass in favor of the doctrine that the sole duty and liability of the first bank is mere transmission to a proper agent.

It is much to be regretted that a question so important and of such constant recurrence should not be conclusively and consistently decided. But there seems little prospect of this consummation at present. The New York courts seem re-

solved to regard it as *res adjudicata*, and it is hardly to be supposed that the courts of so many other States, which have adopted different views, will be induced to change them simply for the sake of attaining conformity with New York, great as is necessarily the proportionate weight of its authority in all matters of financial law. Indeed with all due allowance for this proportionate weight, the balance of authority yet lies overwhelmingly in the other scale. It has been seen that even in New York itself this doctrine has not been conclusively established without a struggle, or without the overruling of cases which had first asserted the opposite doctrine. Since then the later state of the law has not given universal satisfaction to subsequent judges, any more than it did at the time of its enunciation to a large minority headed by so respectable a jurist as the chancellor of the State. The States which have adopted the contrary view have done so consistently, without finding it necessary to overrule or alter previously established law, and apparently none of their judges have seen any cause to regret the position assumed. To us it seems that this position is unquestionably the more sound of the two. As matter of pure law, arguments can be adduced upon each side which never have been, perhaps never can be, *conclusively* answered and crushed by the other side. But if the strictly technical and legal arguments are so evenly balanced, there is a vast disproportion in the semi-legal arguments derived from reason and common sense; and this disproportion is wholly in favor of the side of the non-liability of the bank for the acts of distant sub-agents which it is obliged and expected to employ in a service for which its own remuneration is at best slight and perhaps wholly contingent; indeed so far contingent and so incapable of computation by any exact standard, that many of the courts incline to regard the undertaking as purely gratuitous.

There are a few points interwoven with, but distinguishable from, the precise point involved in the foregoing controversy, upon which all the authorities are united. Whichever doctrine

is adopted, it is adopted only subject to be controlled and modified to any extent, even to the complete substitution of the contrary doctrine, by proof of local usage. If the law has not been already settled by judicial determination so as to exclude any subsequent evidence of usage to subvert it, the bank may absolve itself from liability for the acts of agents other than itself, or the customer may fix such liability upon the bank, by showing, respectively, that such is the established usage and understood custom in the place where the bank, the extent of whose duty and liability is in question, is situated. But the evidence must show a usage having the strictly legal traits; it must be a real *bona fide* usage, an actual practice, a general understanding, not the mere opinion of either merchants or bankers.[1]

Whether the bank is liable for the defaults of the subsequent agents or not, it is certainly liable if it is negligent in selecting competent and proper agents. Its duty is to use every reasonable precaution, so far at least as its own action is concerned, to secure the collection, if possible, and failing this the prompt and accurate performance of all the items connected with the protest. It must therefore either transmit to a bank in good standing, or hand over to a notary in good repute, as the case may be. And if it be proved to have been careless in the choice of the agent and to have selected one which it knew or ought to have known to be an improper one, it will be answerable for the injury resulting therefrom.[2] Ordinarily of course it will be very strong evidence of due care on the part of the bank if it is shown to have selected the agent which it is wont to employ for the transaction of its own business of the same nature,[3] and the courts are accustomed to speak of such

[1] Allen *v.* Merchants' Bank, 22 Wend. 215; Warren Bank *v.* Suffolk Bank, 10 Cush. 588; Jackson *v.* Union Bank, 6 Har. & J. 146.

[2] Fabens *v.* Mercantile Bank, 23 Pick. 330; Ætna Insurance Co. *v.* Alton City Bank, 25 Ill. 243; Stacy *v.* Dane County Bank, 12 Wis. 629; Bellemire *v.* United States Bank, 4 Whart. 105; Bowling *v.* Arthur, 34 Miss. 41.

[3] Warren Bank *v.* Suffolk Bank, 10 Cush. 588; Hyde *v.* Planters' Bank, 17 La. 560; Baldwin *v.* Bank of Louisville, 1 La. An. 18.

evidence as if it were substantially conclusive. Generally it may be thus regarded, but it is clearly possible that a bank may be shown to be culpably remiss in the selection of its own agents, and then the fact that the agent was employed in its private affairs would be no excuse for the employment of the same agent in the affairs of the customer. The contract is not that the bank shall employ its own usual agents, but that it shall employ proper agents. Ordinarily a bank which has to employ a notary public would be authorized to assume that any person bearing the governmental commission of office was a proper person to employ. It has been held that this official character is *prima facie* evidence of satisfactory care in selection.[1] In fact it probably amounts simply to this, that the bank is warranted in putting confidence in a public officer of whom it has no actual knowledge without making that especial inquiry about him, which it would be bound to make if he was simply a private individual bearing no credentials and unknown to the bank officers. But if a bank knows as matter of fact, or ought to know, that a particular notary is for any reason a man unfit for the business and trust reposed in him, the committal of paper to his hands would be an act of carelessness and negligence in the performance of its duty for the results of which it could be held to answer. The standard of fitness is not of course uniform and absolute; we cannot pretend to say what it may be in all the various States of the Union, but we have some knowledge of what it is in Mississippi. The court there declared that it was not sufficient proof of a notary's unfitness to show that he was a man of habitually dissipated character; but that it must be shown "*that he was drunk at the time he took the note.*"[2]

But if the notary is so employed by the bank as to become its own officer, like its cashier or its teller, then of course the bank is liable for all his defaults, not because he is the bank's sub-agent in the sense in which that phrase has been heretofore

[1] Stacy *v.* Dane County Bank, 12 Wis. 629. [2] Bowling *v.* Arthur, 34 Miss. 41.

used in this discussion, but because he is in fact one of its own officials, acting in the discharge of certain allotted functions, within the scope of which the bank is liable for his due performance of his duties, precisely as it is in the case of any other of its regular employees. Thus in Missouri where any private individual is allowed by the laws to perform all the functions of a notary, a bank appointed a person to be its notary for one year and required a bond from him. It was very properly held that he was an officer of the bank, for whose defaults in the line of his employment the bank was responsible.[1]

If paper is deposited for collection, and the party named upon the paper as the person by whom payment is to be made is resident in a distant place; or if the paper is made payable at a bank situated in a distant place; no special directions to transmit the paper to that place are requisite. It is assumed that by virtue of a common though tacit understanding arising from the obvious circumstances such transmission is expected by the depositor and is undertaken by the bank.[2] Accordingly the depositor has a right to demand it from the bank, or to claim reimbursement if it is not done; and the bank upon the other hand is protected in doing it in the ordinary and usual manner.

Transmission of Instructions by the Bank.

If the customer gives any instructions or directions concerning any item in the method which is to be pursued in collecting or protesting the paper, the bank receiving the paper is bound to forward such instructions and directions to its agent or correspondent. If it neglects altogether to transmit, or if it fails to transmit them accurately as the customer gave them, it will be liable for the resulting loss.[3] It may often happen that,

1 Gerhardt v. Boatman's Savings Institution, 38 Mis. 60.

2 Bank of Washington v. Triplett, 1 Pet. 25; Fabens v. Mercantile Bank, 23 Pick. 330.

3 Borup v. Nininger, 5 Minn. 523; Mechanics' Bank v. Earp, 4 Rawle, 384.

where paper payable in one State is deposited in a bank situated in another State, it is necessary in order to hold some of the parties upon it, that presentment, demand, and notice should all be performed according to the laws and usages of the State in which the first bank is situated, rather than of the State where the actual collection or protest is to be made. In such case it is certainly more proper for the depositor to notify the first bank of this fact. But it seems that even if he does not do so, yet the bank, if it is aware or ought to be aware of the existence of the necessity, is bound to transmit to its correspondent full and ample directions as to the precise form to be adhered to throughout the whole process.[1] In fact it was upon this very point that the decision in the famous case of Allen *v.* The Merchants' Bank really turned. The facts of that case were that the notary in protesting complied perfectly with the laws and customs of the place of his own residence. But these were different from the laws and customs of New York city, wherein the Merchants' Bank was situated. And though the court, choosing to call this *a default on the part of the notary*, which was not certainly his personal error, or his default at all in any usual sense of the word, gave a judgment in favor of the plaintiff upon the ground that the bank was liable for the acts of all the sub-agents; yet it was not really necessary for them to have divided upon this question at all, provided they were all united, as they seem to have been, upon the other point which was ruled in the case. This other point was precisely the doctrine just asserted, and the declaration in the opinion was simply that, since the *lex loci contractus* governed, it was the duty of the bank to have notified its correspondents of the requirements of that law, and inasmuch as the loss had been caused by the failure of the notary to comply with those requirements which the bank had negligently failed to transmit, it was in fact caused by the non-performance on the part of the bank of its obvious duty, and must therefore

[1] Allen *v.* The Merchants' Bank, 22 Wend. 215.

be made good by the bank. It is curious thus to observe how easily the whole controversy which has made this cause famous, and a subject of criticism in so many tribunals, might have been completely avoided in it.

Liabilities of the Various Banks directly to the Owner.

If commercial paper is deposited in a bank for collection, and is by that bank transmitted to any other bank or agent, or through any series of banks or agents, till it reaches the possession of the last bank or agent, whose duty it becomes actually to make the collection, each bank or agent actually making the collection can be held directly by the owner of the paper to pay the amount, less charges and expenses, to him. If his demand of payment is refused, without sufficient excuse, he may at once sue the bank or agent. So if the paper is transmitted through several banks, each one of them is directly liable to the owner for its prompt and accurate forwarding to the next bank or agent. In this principle the courts may be regarded as concurring unanimously, though they reach it by somewhat various routes. Some of the opinions — those only of course which hold that the first bank, or any bank in the series, is not liable for the act of any subsequent bank or agent, but only for the due performance of the especial task allotted to itself — regard each bank, and the notary too, if a notary is employed, not as the sub-agent of its predecessor or of the first bank, but as the direct agent of the owner of the paper, for the purpose of doing the precise act which falls to its share in the chain of proceeding. Thus, if the paper is transmitted through three banks to a fourth, which has to collect, and is by that fourth bank delivered to a notary to be protested, it is not correct, according to the doctrine of these cases, to regard the second, third, and fourth banks, or the notary, as sub-agents of the first bank, neither to regard the notary as the sub-agent of the fourth bank. But each successive party is deemed to be an independent agent directly of the owner of the paper, having

for the scope of its agency, in the case of any one of the first three banks, only the transmission to the next; in the case of the fourth bank the collection, or, in default of payment, the delivery to a proper party for protest; and in the case of the notary the various acts which go to make up a legal protest.[1] This view makes the owner's right of action exclusive; the first bank having no right to sue any other.[2] But the other class of cases, which regard all the subsequent banks and the notary as sub-agents, each of its predecessor and all of the first bank, allow a double right of action against the one through whose default loss accrues; for these cases declare that the defaulting agent may be sued directly by the owner of the paper, who is the original principal in the whole series; and at the same time it is a necessity, resulting from the fact of the sub-agency, that suit may also be brought by that first agent who stands to all the subsequent ones in the relation of an immediate principal.[3] It makes no difference that the first bank is regarded as liable for all the sub-agents. This gives the owner a right of action against the first bank, but does not deprive him of the collateral right to sue the defaulting sub-agent directly and primarily if he wishes. He simply has his election whether he will pursue his remedy against the one or the other.[4]

Cessation of the Collecting Bank's Liability to the Owner.

When the last bank has successfully effected the collection it is directly liable to the owner to pay the money over to him only until such time as it has actually remitted the amount to its predecessor.[5] Though of course where the two banks have a running account between them, and the collecting bank credits

[1] Lawrence *v.* Stonington Bank, 6 Conn. 521; Mechanics' Bank *v.* Earp, 4 Rawle, 384; Reeves *v.* State Bank, 8 Ohio St. 465.

[2] Farmers' Bank *v.* Owen, 5 Cranch, C. C. 504.

[3] Wilson *v.* Smith, 3 How. U. S. 763.

[4] Bank of Orleans *v.* Smith, 3 Hill, 560, per Nelson, C. J., who takes pains to show that this does not conflict with Allen *v.* Merchants' Bank, 22 Wend. 215.

[5] Union Bank *v.* Johnson, 9 Gill & J. 297.

the transmitting bank with the amount collected, if the credit under the circumstances is in fact really equivalent to a payment, it will have the same legal effect as a payment.[1] But the facts of the transaction between the banks ought to amount to an actual and *bona fide* passage of title in the amount from the latter bank to the former. This view is contradicted by only one authority, and that is the opinion in the case of the Bank of the Metropolis *v.* The New England Bank.[2] In that cause the facts were as follows: Bank A. indorsed a note over generally in form, but only for the purpose of collection, to bank B. Bank B. transmitted it with indorsement over in the like general form, and for the like purpose to bank C. Bank C. made the collection. Shortly after bank B. failed. Bank A. sued bank C. It was in evidence that there had been mutual and extensive dealings between banks B. and C. for several years previous, and that an account current had been kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection, and charged all costs incurred. Accounts were regularly transmitted and settled on this basis. The paper transmitted always appeared on its face to be that of the respective banks, and to be remitted by each on its own account. When B. bank failed it owed a balance to C. bank. C. bank therefore claimed to hold the proceeds of the paper which came originally from A. bank according to this system of accounting established between itself and B. bank. The court, Chief-Justice Taney delivering the opinion, held that it might so retain the sum; that the possession of B. bank was *prima facie* evidence of its ownership, and that C. bank was under no obligation to inquire whether B. bank really held as owner or as agent. There was no superior equity on the side of A. bank. A. bank, on the contrary, had contributed to give B. bank credit with C. bank by placing paper in B. bank's possession which was *prima facie* B. bank's property, and which B. bank was thus enabled to

[1] Wilson *v.* Smith, 3 How. U. S. 763.
[2] 1 How. U. S. 234.

deal with as if it were its own. C. bank was nowise responsible for the confidence reposed by A. bank in B. bank, and B. bank proving unworthy of it, A. bank and not C. bank should bear the consequent loss. It must be acknowledged that this is potent authority even if it stands alone, and it may in time come to dictate the law. But thus far it is certain that the tendency of other courts has been to take a contrary view.

In McBride *v.* Farmers' Bank,[1] the court declared that the doctrine of The Bank of the Metropolis *v.* The New England Bank had never been adopted in New York, but that the opposite had been frequently and consistently maintained, and it preferred to follow the precedents of the State adjudications; saying that a course of dealing and habit of accounting between the banks could not be allowed to affect the rights of the holder and owner of the paper, who has never parted with his property in it. In Lawrence *v.* Stonington Bank,[2] the court declared that an usage between the banks for the collecting bank to credit the transmitting bank with the amount collected cannot be set up against the real owner of the paper, to rob him of his property by force of a custom or usage with which he has nothing to do. It will be observed that in neither of these cases does the language cover questions which might arise between the banks themselves, wherein the custom established between them might still govern their mutual accountings.

In Van Amee *v.* Bank of Troy,[3] which was cited and relied upon in McBride *v.* The Farmers' Bank, A. indorsed over a note to B. bank, which transmitted to C. bank, which collected. A. was allowed to recover from C. bank, despite the course of accounting between it and B. bank. The court, loath to run counter to the distinguished authority of Chief-Justice Taney, speaking for the bench of the Supreme Court of the United

[1] 26 N. Y. 450; citing as authorities in the State of New York Coddington *v.* Bay, 20 Johns. 637; Rosa *v.* Brotherson, 10 Wend. 86; Stalker *v.* McDonald, 6 Hill, 93; Youngs *v.* Lee, 2 Kern. 551.

[2] 6 Conn. 521.

[3] 8 Barb. 312.

States, sought to reconcile its decision with that of Bank of the Metropolis *v.* New England Bank, by saying that in this case C. bank was put upon its inquiry as to the ownership by any other person than B. bank, and that the circumstances precluded the possibility of supposing any agreement for a lien on this paper to exist between the banks. But this theory was quite illusory; the State court might as well have come out boldly and overruled or disagreed with the national court. It based its notion of C. bank being put upon inquiry wholly upon the fact that A. had indorsed over to B. bank; and a similar indorsement existing in the case before the Supreme Court had not been regarded as putting the third bank upon inquiry, but as passing title for all practical purposes to the second bank. Other cases also militate against the decision of the Supreme Court in the same indirect manner. That court say, in substance, that the indorsement over being general, vests such an apparent title in the indorsee bank, that the subsequent banks are justified, without inquiry, in treating the paper as if the real and absolute title were in that bank. It is upon this principle that the whole decision turns. But other cases hold that indorsement over generally, being a common method where only power to collect, and not the outright title is intended to be conveyed, ought not in fact to be considered as sufficient ground upon which the subsequent banks can assume that the indorsee bank is the real or controlling owner of the paper, but ought rather to put such subsequent banks upon their inquiry, to learn whether the indorsee bank is simply indorsee for collection, or really for ownership.[1] According to this view indorsement cannot safely be taken as conclusive of any thing concerning the title or the power to pledge. It is obvious that if indorsement generally is to have the effect only of putting after takers upon inquiry, or if it is to fall short of establishing a satisfactory presumption of abso-

[1] McBride *v.* Farmers' Bank and Van Amee *v* Bank of Troy, *supra;* Bank of Washington *v.* Triplett, 1 Pet. 25.

lute title in the indorsee, the decision in the Bank of the Metropolis case cannot be sustained. Though that decision has not yet been disagreed with by sufficient opposing authorities to justify us in regarding it as repudiated by the State courts by a common consent, yet there are enough directly dissenting or indirectly inconsistent opinions to show the existence of considerable dissatisfaction with it and of a strong tendency to set it aside.

In Ohio a case arose in which it appeared that the transmitting bank was accustomed to forward a considerable amount of paper to the collecting bank for collection. Soon after the plaintiff's draft was forwarded, the first bank failed. Prior to its failure the second bank had made a large number of collections for it and had remitted to it various sums on account of these, and after the insolvency, had paid over the balance remaining due on account of all the collections to the assignee in insolvency. It was held that the owner of the draft in question had no specific lien on the funds of the insolvent bank, in the hands of the assignee to give him a preference over the other creditors; but that he must prove his claim and take his dividend like the rest.[1]

When the first Bank becomes the Customer's Debtor.

It is obviously inconsistent with the theory that the banks and agents subsequent to the first bank are independently direct agents of the holder of the paper and immediately liable to him, to hold that the receipt of the sum due by any subsequent bank is in law the receipt by the first bank, and at once renders the first bank answerable for the amount. Yet any feature in the dealing of the first bank with any of the parties, which manifests an understanding or intention on the part of that bank to adopt the receipt of the subsequent agent as being its own receipt, will be seized upon by the courts as

[1] Reeves *v.* State Bank, 8 Ohio St. 465.

a ground for holding it directly answerable to the depositor of the paper. In the case of Mackersy *v.* Ramsay, already fully stated *ante*, p. 351, there appears to have been a distinct agreement between the parties that the first bank should pay the depositor so soon as it was notified of the payment having been actually made to the correspondent abroad. In Tabor *v.* Perrot [1] there was no such agreement; but the conduct of the first bank in ordering the foreign collecting bank to give it credit for the sum and in drawing bills in its own behalf against this credit, was regarded as constituting a complete appropriation of the amount to its own use, rendering it directly responsible to the depositor of the paper, from the moment that the credit was given to it in accordance with its order.

Where the first bank pays the amount of the paper to the depositor under the belief, arising from the circumstances, that its correspondent has successfully effected the collection, if it should afterward turn out that the collection has not in fact been thus effected, such bank may recover back from the depositor the amount so paid to him, on the ground that it was a payment made under mistake of fact. So if the payment was made by any bank, other than the collecting bank itself, to its predecessor in the series of agents.[2]

Effect of Indorsement as between Bank and Customer.

Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, but intending by the indorsement only to put it in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank; nor does the bank owe the amount to the customer until such time as the collection is actually consummated. Neither is this strict right of the bank curtailed or altered simply because a practice has been

[1] 2 Gall. 565.

[2] Bank of Orleans *v.* Smith, 3 Hill, 560; East Haddam Bank *v.* Scovil, 12 Conn. 303; Mechanics' Bank *v.* Earp, 4 Rawle, 384.

allowed to prevail by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege allowed by the bank, which does not grow into a binding legal usage. Thus it is very common for depositors to deposit checks with their banks and to draw against them on the same day checks of their own which may be presented for payment before the bank has had an opportunity to collect upon the deposited checks. In such cases banks are frequently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the banks is a pure favor and if there be no distinct understanding to change the natural effect of such dealing, its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may for any arbitrary reason see fit to withhold that kindness which it usually consents to exercise.[1] In England a decision, given by Lord Ellenborough,[2] went much further even than this. Bills, not yet due, were sent to a country banker to collect; according to the custom of country bankers, these were actually entered in the banker's own books to the depositor's credit, with the proper discount, and he was thereafter entitled to draw against this credit before the actual collection. Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him and that the depositor should recover them specifically, or their amount if the bankrupt's assignees had already made the collection.

Default of the first Bank.

Any act of neglect committed by the first bank itself renders it liable for the loss or injury resulting therefrom to the depositor. Thus if the paper is returned to it by its correspond-

[1] Scott v. Ocean Bank, 23 N. Y. 289.
[2] Giles v. Perkins, 9 East, 12.

ent as uncollectable, it must in its turn promptly send the paper back with this information to the owner.[1] If it is the duty of the bank to procure the acceptance of a draft or bill, it is bound to procure and absolute an outright acceptance, legally binding upon the acceptor at least so far as concerns the form and circumstance of the act itself of accepting. If it takes any acceptance which is irregular in form and which therefore fails to hold the party drawn upon, and rests satisfied with this without at once notifying its principal, it will be liable itself to pay the amount of the paper if otherwise the amount would be lost to the depositor by reason of his inability to hold the proper party as acceptor.[2] If the bank takes the check of the party who is bound to pay the paper, and thereupon surrenders the paper up to him, it assumes the responsibility of the check proving good. If it is not paid the bank is still obliged to pay the amount to the person from whom it received the paper.[3] But if the bank can show that it has conducted itself in the transaction in strict accordance with the customary and established mode of transacting such business, it seems that this might suffice to acquit it of all responsibility for any mishap. For it has been held in England that a banker who gave up bills indorsed to him for collection, upon receiving the acceptor's check which was subsequently dishonored, could not be charged with negligence because the transaction was not an unusual one.[4] That he could not be charged with negligence does not, however, preclude the possibility of charging him as having assumed to guaranty to his own customer the payment of the check which he had taken in exchange for his customer's paper. Further it should be remarked that it would not free a banker from liability, at least of the latter nature, if he

1 Van Wart v. Woolley, 3 Barn. & Cress. 439; Wingate v. Mechanics' Bank, 10 Barr, 104; McKinster v. Bank of Utica, 9 Wend. 46; 11 id. 478.

2 Walker, President of Bank of Utica v. Bank of State of New York, 5 Seld. 582.

3 Commercial Bank v. Union Bank, 1 Kern. 203.

4 Russell v. Hankey, 6 Term, 12.

simply showed a frequent habit of parting with paper upon receiving the check of the debtor; but he would have to go further and show positively that it was *understood* in all such transactions that the banker discharged his full duty to his customer by so doing; as otherwise the usage would amount only to an usage of bankers to assume a liability to their customers in such cases.

Initiation of Suits and Rights of Action.

The scope of a collecting bank's agency does not extend to the initiation of suits against the debtor upon commercial paper of which payment is refused.[1] Indeed it is conceivable that the bank might be seriously prejudiced by the institution of such proceedings: for the fact might, under some circumstances, be evidence going to show that the bank had itself adopted the paper, and therefore, whether it were paid or not, owed the amount of it to the original holder.[2] But in New York, in which State it will be remembered that it is held that the first bank which receives paper for collection is responsible for the conduct and doings of all subsequent banks and agents through whose hands it is obliged to pass in the process of collection, it has been ruled that this first bank has such an interest in the paper as to give it a right of action to recover full damages for any injury resulting by reason of any default on the part of any subsequent agent, in a suit against such agent, although no steps have been taken by its own principal to hold itself liable to respond to him for his loss.[3] Whether or not this principle would be sustained in States which do not hold the first bank to that liability to which it is held in New York is perhaps doubtful, though certainly very improbable.

In case of any default on the part of any bank engaged in conducting the collection whereby it would ordinarily lay itself

[1] Crow v. Mechanics' & Traders' Bank, 12 La. An. 692.
[2] Wetherill v. Bank of Pennsylvania, 1 Miles, 399.
[3] Commercial Bank v. Union Bank, 19 Barb. 391; 1 Kern. 203.

open to a suit by the party who deposited the paper for collection, suit may also be brought, instead, by any real party in interest, though his name was not mentioned and the fact of his interest was entirely unknown to the bank at the time of its receiving the paper. The naked fact that such person had a real beneficial interest in having the bank do its duty in the premises, and must therefore be an actual loser in some shape by its failure to do so, gives the right of action.[1]

In New York, where the collecting bank is held liable for the default of a notary employed by it, the measure of damages which the holder of the paper can recover from the bank on the ground of such default of the notary, is the amount of the note and interest. If the holder has sued an indorser and has failed to recover by reason of the default of the notary, it cannot increase the damages by adding the expenses of the suit. For the action against the bank is based upon the implied undertaking of the bank to give the notice and not upon any false representation that the notice has been duly given.[2]

Discretion of the Bank in Doubtful Cases.

If any point of law concerning any act in the business of collection is in doubt by reason of having never been adjudicated upon, if the bank using its best discretion should pursue the course which the courts subsequently declare to be improper and illegal, it will nevertheless be absolved from all liability for the results of its mistake.[3] But if the bank makes a mistake for which it has no such excuse, as simply a mistake of misreading, it will not be discharged from its liability to make good the consequent loss.[4] Though of course in this case of a misinterpretation it is to be supposed that if the writing really appeared so illegible that the mistake was reasonably

[1] McKinster v. Bank of Utica, 9 Wend. 46; 11 id. 473.
[2] Downer v. Madison City Bank, 6 Hill, 648.
[3] Mechanics' Bank v. Merchants' Bank, 6 Met. 13.
[4] Bank of Delaware County v. Broomhall, 38 Penn. St. 135.

excusable *and*, which is essential, the bank by reason of distance and want of time was actually unable to obtain directions or explanations from competent authority, it would be acquitted if it pursued its own best discretion. In the cited case there was obvious negligence on the part of the bank in the reading of the note.

In what Currency Payment must be made.

When a bank makes a collection and passes the amount to the general credit of the owner of the paper, he has the right at any subsequent time when he shall demand payment, to have the payment made to him in such currency as ordinary depositors in the bank are entitled to receive. But if the currency in which the collection was made was at that time depreciated, the amount of the indebtedness of the bank to him will be only the value of the currency which the bank received at the time of the receipt. The depreciation then existing he must submit to as his loss; but subsequent depreciation is the loss of the bank.[1] It is to be assumed of course in order to bring this rule into operation, that the circumstances justified the bank in receiving the payment in the depreciated currency. If it had a right only to receive it in good money and it chose to take depreciated funds at their nominal value, it would of course be obliged to credit the owner of the paper with the full nominal sum *in money*, which only it had a right to accept on his behalf, and then it could not afterward acquit itself by a payment of such less sum as was the value in money of the funds actually taken by it in its own voluntary wrong without authority from, and in derogation of, the rights of the depositor of the paper.

[1] Marine Bank *v.* Fulton Bank, 2 Wall. 252.

CHAPTER VII.

USAGES AND CUSTOMS.

The banking business is peculiarly a business of routine. To an unusual degree it requires and admits of a thorough and perfect organization even in the most minute matters. Hence it naturally results that bankers and banks, much more than any other class either of individuals or corporations in the business community, are wont to institute many rules, usages, and customs whereby they seek to regulate the conduct of their daily affairs. These rules, usages and customs assume various forms; thus there are those which are recognized by all, or by the vast majority of the banks doing business in a single city; there are those which are peculiar to a small minority; there are those which have been adopted by a single bank either in the shape of by-laws or only as practices habitually observed by it; there are the laws or articles of clearing-house associations. These are of various degrees of authority according to their nature; but a satisfactory treatment of them is rendered difficult, indeed impossible, by reason of the strange lack of cases upon some of the most obvious and important points.

Banking-Hours.

Only one banking usage has ever been judicially taken notice of by the courts, and that is the usage of "banking-hours." All banks are wont to establish certain hours of the day within which only they will undertake to transact business either with the public or with their own customers. The "day" in banking parlance means simply these few hours. In large cities the

banks are wont to agree upon and adopt the same hours. Whether or not the courts will take judicial cognizance of what are banking-hours in any particular place is of course a question which must be decided specially concerning that particular place. American courts, however, are wont to take judicial notice of the banking-hours of any large city lying within the area of the jurisdiction of the court. Though there is no authority for supposing that the banking-hours of the city of New York would be considered as judicially known to the courts of Boston or Chicago, or *vice versa*. Unquestionably proof would have to be introduced. Only the courts sitting in those cities respectively, and perhaps the courts sitting elsewhere in the respective States, would judicially know the respective banking-hours. The English courts take judicial notice of what are banking-hours in the "city," so called, of London;[1] but in other parts of London and in other cities and towns, the hours must be proved.[2]

Essential Elements of a Legal Banking Usage.

What lapse of time, or how many instances actually occurring, are requisite to establish a custom, is one of those questions attended with such an intrinsic and essential indefiniteness as prevents the possibility of any certain answer. An usage must have a beginning, certainly. But in its early stages it is no more a complete usage in the eye of the law, having the legal attributes thereof, than a boy in his nonage is a man, having the legal rights of a man. Twenty-one years is the arbitrary limit which distinguishes the legal infant from the legal man. But no number either of years or of recurrent acts and instances, can be arbitrarily set to mark accurately the transition period when the usage ceases to be embryonic and becomes perfect. The understanding, arrangement, or directions of bank officers that a certain method shall there-

[1] Parker *v.* Gordon, 7 East, 385; Jameson *v.* Swinton, 2 Taunt. 225.

[2] Hare *v.* Henty, 10 C. B., N. S. 65.

after be observed as the usage of the bank for the transaction of a certain class of acts, does not render this method a legal usage of the bank as towards any outside party until time and practice shall suffice to give it that character which it does not and can not derive from the intention of the officials. But time and practice bring in their train acquiescence and notoriety, and from these the law will draw the inference of knowledge on the part of the public, if the usage is that of the banks generally, or on the part of the parties dealing with the bank, if the usage is that of an individual bank only. Especially if the custom is in derogation of the common law, a short time and a few instances of practice under it will be insufficient to obtain its recognition.[1] But a single instance of practice under a usage, though it would be utterly worthless to establish the fact of the custom is yet amply sufficient to bring home notice of the existence of an already established custom to the persons dealing with the bank and having knowledge of such single instance.[2]

Properly speaking a banking usage ought to be peculiar to a certain city rather than to a certain bank.[3] Any special system consistently and uniformly adopted by all the banks of a particular place is a matter which may properly be assumed to be known to the community which resides and does business in that place. The duty and the right of the public must then be regarded as reciprocal. Each individual will be held to a knowledge of such general usage, though he was in fact ignorant of it, and was a loser solely by reason of this ignorance. On the other hand each individual will have a right to assume and demand that any bank in the place shall deal with him according to this usage, unless he has actual notice that it intends to deal otherwise, or unless his relations to the bank are such that the court will not hear him deny that he has had

[1] Duvall v. Farmers' Bank, 9 Gill & J. 81; Adams v. Otterback, 12 How. U. S. 589.

[2] Dorchester and Milton Bank v. New England Bank, 1 Cush. 177.

[3] Adams v. Otterback, 12 How. U. S. 589.

such notice. It has been said that persons dealing with any bank fall within the latter description and are bound to know its customs and usages. The cases to this effect are numerous and conclusive, but in order to understand them aright, it is peculiarly necessary to observe the facts which are discussed in each, and to interpret the language by the light of these facts. This process will show very clearly that the dealing with the bank which is commonly declared to conclude the dealer from alleging ignorance of the customs of the bank, is where such person is a customer of the bank, or is making use of the facilities which it holds out. A depositor in a bank or one who gives a note to a bank to collect, or who makes his notes payable at a bank, is properly held imperatively to an implied knowledge of the legal usage of the bank in its dealings with depositors, in its collecting, or in its system of paying notes made payable at its counter. He is a dealer with the bank in these matters.[1] But the fact that one is the holder of a check drawn upon a bank, or the debtor upon a note held by it for collection, or is the payee of paper made payable at its office, does not bring such person within either the reason or the language of these decisions. He is not a customer, nor, in the sense in which the word is used in these cases, is he one dealing with the bank. He is therefore held to no knowledge of any peculiar habit of this individual bank. He must assume, unless he has positive knowledge to the contrary, that it conducts its transactions like the other banks in the same place; and its usage to conduct them differently in any respect must be specially brought home to him before it can affect him disadvantageously. But the custom of the single bank, once known, enters into all subsequent contracts and dealings with it.[2] The doctrine is very clearly put by Mr. Justice Story in

[1] Bank of Columbia v. Magruder, 6 Har. & J. 172; Lincoln and Kennebeck Bank v. Page, 9 Mass. 155; Smith v. Whiting, 12 id. 8; Mills v. Bank of the United States, 11 Wheat. 431; Chicopee Bank v. Eager, 9 Met. 584; Lime Rock Bank v. Hewett, 52 Maine, 531; Gindat v. Mechanics' Bank, 7 Ala. 325.

[2] Patriotic Bank v. Farmers' Bank, 2 Cranch, C. C. 560; Renner v. Bank of

the cited case of Mills *v.* Bank of the United States. If a note is made payable at a particular bank there is no ground for demanding that the bank shall depart from "general commercial usage" for any other purpose than that of conforming to its own individual usages. Evidence of the usage of any number of other banks not amounting to "general commercial usage" is inadmissible to fix the duties of this especial bank, unless conformity to this particular usage and adoption of it can also be brought home to this bank. It cannot be supposed that "the particular usage of other banks not mentioned in the contract" ever fell within the contemplation of the parties to that contract.[1]

But if there is no intimation whatsoever upon a note that the maker intended or expected that it would be negotiated at a particular bank, he is not bound by the fact that he has positive knowledge of the usage of such bank in regard to notice, &c., upon such notes. For it does not appear that he ever anticipated that his note would ever come into this bank and therefore that this usage would be applied to this particular note. The case of the Lime Rock Bank *v.* Hewett furnishes an unusually excellent illustration of this doctrine. Two notes were sued upon in that case, and the same person was an indorser upon each. One of them was made payable at the bank, and was indorsed over by him to the bank. The other was not made payable at the bank, and was indorsed by him generally; indeed there were subsequent indorsers before the note came into the possession of the bank. The indorser was shown to be personally connusant of a usage of the bank in notifying. Upon the first note it was held that he was bound by this usage, the circumstances constituted a conclusive presumption of his assent, and would have been equally conclusive of his knowledge had this not been otherwise expressly shown. But

Columbia, 9 Wheat. 582; City Bank *v.* Cutter, 3 Pick. 414; Bridgeport Bank *v.* Dyer, 19 Conn. 186.

[1] Camden *v.* Doremus, 3 How. 515.

upon the second note he was held not bound by the usage. For though he knew it, yet it was, as regarded this note, a mere abstract fact, there being nothing whatsoever to show that he ever contemplated that the note should pass into the possession of this especial bank, or be subjected to the effect of any of its usages.

Generally speaking it cannot be presumed that a person is acquainted with the customs of doing business which obtain among the banks of any place distant from that in which he himself lives and deals. But if he enters into any transaction which he is aware must be reasonably expected to involve a dealing with or through the banks of the distant place, his knowledge of and assent to their customs will be implied. This is only a slight extension of the principle which declares every person dealing with a bank to be affected with knowledge of its usages, and is supported by the cases which assert that doctrine.[1]

Established Usages and Alterations in them.

Usage having been once found and sanctioned by the courts, evidence to disprove its existence becomes thereafter inadmissible. But this refers only to its existence at that time at which the decision found the fact of its existence. For a usage is sustained by the courts not because it is in itself law, but generally in spite of the fact that in itself it is not law and because it is the uniform practice of the community which the judiciary from motives of policy will refrain from interfering with. But if at any time it ceases to become the practice of the community it will no longer be judicially recognized as binding. For all transactions occurring during the period that it remained unchanged it must always be law, but transactions occurring after the change will not be affected by it. Evidence of the fact of a change is therefore admissible to show that

[1] Bank of Washington v. Triplett, 1 Pet. 25.

the previous decisions have ceased to be controlling precedents, or to indicate the true rule.[1]

Precision in Proof of Usages.

The business of banking admits of great nicety of organization in matters of detail. To this trait is doubtless due the great strictness and accuracy with which customs must be proved and will be construed. So far from its being permissible to make the slightest approach to a generalization or to an argument from the closest of analogies, the tendency of the courts has been to trim the usage to its very narrowest proportions, and to require the most perfect adaptation of the facts of the case to these. That two acts are essentially dependent for their exercise upon power of precisely the same description, that one is a natural corollary of the other, that one is conveniently exercised in conjunction with the other, will not suffice to authorize the doing of the second when the right to do the first is dependent upon a custom. Even power to do a certain act arising from a custom to do it for a particular purpose or under particular circumstances, does not imply or include power to do the same act for a very slightly different purpose or under very slightly different circumstances. Supporting an act upon proof of a banking usage is a matter of very delicate and minute accuracy.[2]

"Internal Usages."

The customs and usages of a bank by which persons outside of the corporation can be affected, are only such as relate to its dealings with such outsiders. Rules, usages, and customs established within the institution itself for the regulation of its internal affairs and of the daily routine of its business, for the government of its clerks, the keeping of its books, and all

[1] Cookendorfer *v.* Preston, 4 How. U. S. 817.
[2] Mussey *v.* Eagle Bank, 8 Met. 306.

like matters, are things with which the public has nothing whatsoever to do. They may be arbitrarily instituted and changed at any time by the government of the bank. They are only for its own convenience. Even if they are known to its customers, no assent on the part of the customers is implied by reason of this knowledge. They do not affect the rights of the customers, in which alone the customers can be supposed to be interested; they are the internal arrangements with which the customer has nothing whatsoever to do whether he knows them or not and whether he approves them or not. Their observance or non-observance is an affair exclusively between the corporation and its servants.[1]

By-Laws.

A by-law does not constitute a usage; neither is it proof of a usage. If a by-law requires a person having a certain transaction with a bank to perform a certain act, and he in fact does not perform it, he cannot be affected with the legal consequences of a performance on the ground that it was a usage of the bank to require performance, that he knew the usage and must be assumed to have intended to conform to it.[2] Thus in the case cited it was held that to admit evidence of the usage set up would be to admit parol testimony for the purpose of varying the written contract of indorsement; and this of course would be impossible. Further, it was said, the usage claimed, if proved, would be only a usage for the customer to make such an agreement. By strict construction, therefore, it would not, even if fully shown, have any effect upon a transaction in which the agreement was distinctly *not* made.

A by-law of a bank, or even its usage, if the usage be known to the stockholders, of refusing to allow any stockholder to transfer his stock so long as he is indebted to the bank, is

[1] Munn *v.* Burch, 25 Ill. 35.

[2] Central Bank *v.* Davis, 19 Pick. 373; Piscataqua Exchange Bank *v.* Carter, 20 N. H. 246.

valid and binding. The bank has a lien upon the shares for the amount of its claim, at least as against the shareholder himself or against his assignees under a voluntary assignment for the benefit of creditors.[1] But whether or not the lien of the bank would be good as against an assignee in bankruptcy or an attaching or execution creditor is a different question which might perhaps receive a different answer. In Massachusetts the point has been considered doubtful.[2]

Construction of Transfers.

Where a transfer is made to a cashier the question has been already discussed, of whether or not it can enure to the benefit of the bank and under what circumstances. Whether evidence of usage to transfer to the cashier with the design that the transfer shall operate in fact as a transfer for the use of the bank can be introduced, must be regarded as still unsettled. If introduced it would be for the purpose not of varying the contract, but of interpreting it: not of controlling any rule of law, but of explaining the intention of the parties. On this ground it has been held admissible in Connecticut; but by a divided court.[3] In Massachusetts a contrary opinion was intimated, though not directly laid down.[4]

Construction of Checks, Payable on Future Day certain, as to Grace.

In the chapter upon Checks has been discussed the question of whether or not instruments in their general form checks, but made payable on a future day certain, are or are not entitled to grace. Attempts have been made in some of

[1] Morgan *v.* Bank of North America, 8 Serg. & R. 73; McDowell *v.* Bank of Wilmington, 1 Harr. 369; Child *v.* Hudson's Bay Co., 2 P. Wms. 207.

[2] Nesmith *v.* Washington Bank, 6 Pick. 329; Plymouth Bank *v.* Bank of Norfolk, 10 id. 454.

[3] Stamford Bank *v.* Ferris, 17 Conn. 259.

[4] New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275 (Per Parker, C. J.), p. 278.

the causes in which this point has been raised to introduce evidence of usage. The difficulty in admitting such testimony has been considered to lie in the fact that it is the proper province of the court to declare what is the legal character of such documents, whether they are checks or bills of exchange. The law, it is considered, must make them imperatively either the one or the other, and according to the decision must be the equally imperative assertion of whether or not they shall bear grace. Usage therefore has been deemed inadmissible, because its only effect, if it should have any at all, must be to control a rule of law. A few authorities sustain this view.[1] It was certainly the view which the court of New York were inclined to take at the time of the decision of Bowen *v.* Newell. No one who reads that opinion can fail to gather this conclusion from it; and it was upon the strength of this that the Ohio case was decided. But the latest authority in New York is the decision in the case of Bowen *v.* Newell as last rendered and revised, published in 3 Kern. 290. Here the court say that the lower court have found that the law in Connecticut, where the paper was payable, gives no days of grace upon it; that this finding of the law was "upon evidence derived from the best sources and of the most unquestionable character." By turning to the report of the cause in the lower court[2] we find that this so emphatically excellent evidence, which was allowed so thoroughly to settle the law, was simply evidence of the usage of banks and of persons dealing with banks in Connecticut. The court escape the trouble of reconciling this view with their former contrary one, by the arbitrary assertion that in 4 Selden they only held, that, *by the law merchant*, the instrument was not entitled to grace. This assertion will satisfy nobody, for it is not true. But its degree of accuracy is a matter of little moment since the last

[1] Morrison *v.* Bailey, 5 Ohio, St. 13; Minturn *v.* Fisher, 4 Cal. 85. See also Woodruff *v.* Merchants' Bank, 25 Wend. 673; Bowen *v.* Newell, 4 Seld. 190.

[2] 2 Duer, 584.

ruling, in 3 Kernan, is too clear and positive to leave any doubt as to the law in New York State.

The doubt is simply, whether or not the allowance or disallowance of grace upon a certain anomalous description of paper is a proper subject of usage. Why it should not be so, it is difficult to say. It is clear that such paper whether it be called a check or a bill of exchange, is a materially modified form of either. It is in fact an independent species of paper. When therefore it is considered that the entire principle which gives days of grace upon particular species of commercial paper was in its origin wholly a matter of the usage of bankers; there seems no reason why the same usage if actually shown to exist, should not be properly extended to still another species of paper, of comparatively modern origin. Even if the instrument is a check, it is a peculiar alteration of the common form of checks. It is clear that the allowance of grace on business paper is a proper subject of usage since it owes its very existence to usage. Why then are not checks equally a proper subject for usage, and if so why may not usage draw distinctions in this respect between two different descriptions or classes of checks which vary from each other in so important a trait that very many courts are unwilling to apply the common name of check to each of them, but reserve it for the more usual kind, and prefer to describe the others as bills of exchange?

Presumptions established by Course of Dealing.

The course of dealing between two banks may be given in evidence for the purpose of raising a presumption from it. This is not precisely a usage; that is to say, it is not always necessary that it should bind the banks as an arbitrary rule for the conduct of their affairs with each other. Therefore the inference based upon it is not absolutely conclusive, but is capable of being rebutted by proof that the habitual course of dealing had in the particular instance been departed from. It is strictly as a

habit, which gives rise to certain natural suppositions, not as a legal usage which imperatively fixes those suppositions as facts, that such evidence is admitted. Thus that two banks are wont to exchange accounts at short intervals, and each promptly to object to the account rendered by the other if it claims any error therein; that such accounts have been rendered, covering a point subsequently disputed but not objected to within the usual time, are acts admissible in evidence as going to show actual correctness and that the correctness has been acknowledged. But the same evidence would be incompetent to establish an usage between the banks of objecting promptly which should have the effect of estopping the bank which had failed so to object from afterwards claiming the correction of the error.[1]

By-Laws and Usages in Derogation of the Rights of third Parties.

A bank cannot arbitrarily make by-laws or institute usages which shall injuriously affect the rights of third parties. If any person deliberately assents to such by-laws or usages, it becomes a different matter, and thereafter, as a mutual understanding or agreement the bank might doubtless enforce it as towards this individual. But such assent, implying the waiver of valuable rights, will never be presumed simply because the bank has insisted upon laying down the rule for its own conduct. Thus a by-law or usage requiring all errors in payments over the counter, or in receipts or entries in a depositor's bank book, to be corrected by the party before leaving the banking-rooms, are absolutely devoid of any effect whatsoever. That as a matter of fact the party did count his money or did examine the writing or entry before he left the rooms, and that he then made no objection to the accuracy of the transaction, might be admissible in evidence to sustain, so far as it could, the presumption of correctness. But it would be strictly as circum-

[1] Union Bank *v.* Planters' Bank, 9 Gill & J. 439.

stantial evidence; and the further and independent fact that it was the law or usage of the bank to refuse to make any adjustment unless this process was observed would have nothing whatsoever to do with the matter, and would doubtless not be admitted in evidence, by reason of its entire impertinence. Neither can this power, which the directors could not claim at common law be asserted by virtue of the authority, given them by legislative enactment, to regulate the conduct of the business and affairs of the bank. Such authority does not empower them to make rules which shall wrongfully affect the rights of outside dealers with the corporation.[1]

Usages in contravention of Enacted Laws.

It may undoubtedly be laid down as a general principle that no custom or usage among banks, however universal or long established or uniform it may appear to be, can give validity to any transaction upon their part which conflicts with a positive statutory enactment. But though the doctrine in this shape is clearly sound it has been thus far illustrated only by cases arising under the usury laws. Banks have often sought to evade the restrictions of these laws under cover of a customary course of dealing. But all such efforts at evasion have thus far been rigorously defeated by the courts.[2] An apparent exception to this statement might be supposed to be found in the custom of banks, when discounting, to deduct the interest *in advance*, thereby securing to themselves interest upon this interest for the period for which the discounted paper runs, and so actually receiving a fraction of one per cent more than the regular rate. But this should be regarded rather as an express power conferred by charter or organic law than as an exception based solely upon usage. Power "to discount" is

[1] Farmers' & Mechanics' Bank v. Smith, 19 Johns. 115; Gallatin v. Bradford, 1 Bibb, 209.

[2] Niagara County Bank v. Baker, 15 Ohio St. 68; Protection Ins. Co. v. Harmer, 2 id. 452; New York Firemen's Ins. Co. v. Ely, 2 Cow. at p. 707; Dunham v. Gould (Per Chanc. Kent), 16 Johns. 367.

usually in terms given in all such charters and laws. If not given it must be regarded as one of the essential elements of the banking business, which must be enjoyed by every banking institution by virtue of its general character and the objects for which it exists. Now "discounting" means a loan of money upon business paper where the interest is thus deducted beforehand; the deduction in this shape is a part of the definition of the word, an essential element in the transaction itself. A corporation therefore entitled to conduct the general business of banking, *a fortiori* a corporation specially empowered "to discount," has legislative authority to compute interest in this peculiar manner. The habit of doing so must unquestionably in its origin in time past have been recognized as a usage. But since then it has come to be an inherent part of the transaction of discounting, and whenever discounting is done under legislative permission this computation may be made by virtue of the same permission and as part thereof. The exception to the usury laws is not therefore based on the solitary fact of a usage, but of a usage incorporated into and sanctioned by legislative enactment, and it is the latter not the former ground that must be relied upon as really authorizing the taking of usurious interest.[1]

Cases in which Usage cannot be set up.

Usage cannot be shown to absolve a bank from a positive and essential duty. The omission of any material portion of a transaction which it undertakes to perform cannot be excused on the ground of a custom to omit such portion. What the bank undertakes to do, it must do; it is only the manner of the doing, not the doing itself, that can be the proper subject of a custom.[2]

No act which practically amounts to a wrongful appropriation or an improper use of the corporate funds can be sanctioned

[1] See McLean *v.* Lafayette Bank, 8 McLean, 587.
[2] Borup *v.* Nininger, 5 Min. 523.

by a usage. Thus a usage to honor the occasional overdrafts of customers, whose general standing and repute is good, is bad at law. Proof of such a usage will not protect the corporation or any of its officers concerned in the transaction from the natural and ordinary results of its wrongfulness.[1]

Laws regulating legal tender cannot be affected by any local usages to disregard them, prevailing among banking houses.[2]

It is a matter of ordinary occurrence for persons using printed blanks for checks to cancel some portion of the printed matter which does not suit their temporary convenience; and banks are wont to disregard the fact of such cancellation as matter of suspicion, and to assume that it was done by the proper and authorized person. But the banks do this at their peril, and are not to be saved from a consequent loss simply because they can show a custom on their part to regard erasures of printed matter as no evidence of unauthorized alteration, when the same erasure of written matter would be so. Such a custom, said the court in Connecticut, has not existed so long or become so general as to be a part of the law merchant, and no person will be affected by it unless he be positively shown to have had knowledge of such an usage on the part of the bank and to have acquiesced in it.[3] The habit is certainly somewhat older now than it was when that decision was rendered; but mere age will hardly give it authority in the courts. It is a usage containing intrinsic objections which may very probably prevent it from ever receiving recognition except upon proof of direct assent to it by the parties concerned.

Arbitrary Alteration by a Bank of its Usages or Rules.

A bank cannot by an arbitrary change in any of its rules or usages, injuriously affect the rights or interests of any dealer with it, who has previously had knowledge of such rules

[1] Lancaster Bank v. Woodward, 18 Penn. St. 357.
[2] Marine Bank Cases, 27 Ill. 525; 28 id. 90, 463; 29 id. 248.
[3] Mahaiwe Bank v. Douglass, 31 Conn. 170.

and usages, without bringing home to him positive notice of the change. Until he has been sufficiently notified to the contrary he has the right to expect the ordinary course of dealing to be continued.[1] But to enable the customer to take advantage of this doctrine, he must show that the alteration has taken place in an actual rule or *bona fide* usage, in the legal sense of the latter phrase, of the bank. The usage need not be a *general* usage of the bank; it may be one which is only good as between himself and the bank. For usages of this limited nature may exist and a bank by its course of dealing with a single customer may assume special obligations towards him individually which do not bind it as towards anybody else.[2] But whatever be its extent it must constitute a usage proper. A mere gratuitous habit on the part of the bank to allow its customers privileges or favors, if it be really nothing more than this, may be stopped by the bank at any moment without prior notice, and without placing itself under any liability. It is of course impossible to draw an accurate line of demarcation between the usages which are of the former class and the habits which fall within the latter description. In each instance the appropriate character will be conferred by a combination of all the many minute circumstances which can be adduced to interpret the true nature of the transactions.

Certain Special Instances.

Two or three special cases, in which certain matters have been regarded as proper to be the subject of usage and to be controlled thereby should perhaps be mentioned before leaving this portion of our topic. A custom of common carriers and messengers to leave parcels or notices directed to a particular officer of the bank at some especial desk, or with some officer

[1] Barnes *v.* Ontario Bank, 19 N. Y. 152; Cumming *v.* Shand, 5 Hurl. & N. 95; 29 L. J. Exch. 129.

[2] Hotchkiss *v.* Artisans' Bank, 42 Barb. 517.

other than the one named, may be shown; and delivery made in accordance with such custom will be a sufficient discharge of his duty on the part of the carrier or messenger.[1]

An established custom that notices intended for the directors shall be left upon the cashier's desk, will bind any director whose own notes may happen to come into the bank.[2]

Commencement day at Harvard College (situated three miles from Boston) is not a legal holiday, upon which by statute the Boston banks would be authorized to close. But it has long been their usage to do no business upon that day, and to make demand and give notice, &c., upon commercial paper, upon the day preceding, in like manner as in case of Sundays and the like. The courts of Massachusetts have recognized the custom as good.[3]

A country bank in the State of New York was wont to send paper left with it for collection in New York city, by the captain of a steamboat plying to the city, instead of sending by mail. It was also wont to send only once a week, except in cases of an unusual accumulation of paper. The steamer arrived in the city early in the evening of the same day on which it started.

The court held that the custom was not inoperative as being unreasonable, or as wanting any of the requisites of a good custom; and that at least as towards all persons affected with knowledge of it, it was valid and binding.[4]

Usage proved by Parol Testimony.

The custom or usage of banks generally, or of an individual bank, may be sufficiently proved by parol testimony.[5] It is not

[1] Hotchkiss v. Artisans' Bank, 42 Barb. 517.

[2] Weld v. Gorham, 10 Mass. 366.

[3] City Bank v. Cutter, 3 Pick. 414.

[4] Bridgeport Bank v. Dyer, 19 Conn. 136.

[5] Renner v. Bank of Columbia, 9 Wheat. 587; Mills v. Bank of United States, 11 id. 431. Indeed in a large proportion of the cases cited in this chapter parol evidence has been admitted without objection.

necessary that the witnesses who are relied upon should be experts in the banking business or in any manner engaged in the same, or connected with any bank whose individual usage is to be shown. If they have had any dealings which have brought the custom or usage within their observation and cognizance so that they actually know it as a matter of fact they are competent to testify to it, and it may be established by their testimony alone.[1]

Clearing Houses.

In all large cities where the banking business is sufficiently considerable to demand such a convenience "clearing houses" are established. The main purpose of these is to render the daily settlements of the banks with each other simple and expeditious. The substantial characteristics of the plan are these: At a certain hour every morning, usually at ten o'clock, the deputy of each bank attends at the room of the clearing house bringing with him all the checks upon other banks which have been received by his own bank since the same hour of the preceding day. Each bank has its drawer or box in the room, and the messengers of all the other banks distribute all the checks which they have in their possession, placing each of them in the drawer or box of the particular bank upon which it is drawn. Each bank is then credited on the books of the clearing house with the amount of checks upon other banks which it has brought in for collection and is debited with the amount of the checks drawn upon it which all the other banks have brought. If the former amount exceeds the latter the bank is then declared to have "gained" the amount of the excess; but if the latter amount exceeds the former the bank is declared to have "lost" the amount of the difference. It is obvious that the sum total of the losses of the losing banks must be precisely equal to the sum total of the gains of the gaining banks. At a later hour in the same day the losing

[1] Griffin v. Rice, 1 Hilt. 184.

banks are obliged to bring into the clearing house the sums which they have respectively lost; and shortly afterward the gaining banks come and receive from the officers of the clearing house, out of the funds thus furnished by the losers, the amounts of their respective gains. In this manner the business of settling the daily balances and exchanges between the several banks is accomplished with extraordinary rapidity, accuracy, and cheapness. The computation of how much each bank has brought in against others and of how much the others have brought in against it, is performed by skilful clerks in a very few minutes. So soon as it is finished an officer of each bank takes from its drawer or box all the checks against it which have been placed therein by the other banks and carries them back to his own bank to be examined, for the purpose of seeing whether or not any of them must be dishonored by reason of want of funds of the drawer. The casting of the balances at the clearing house is not of course, as it would be impossible that it should be, binding upon any bank as to the genuineness or the honoring of the checks which are placed in its drawer and which purport to be honestly drawn upon it by depositors having funds. A time is therefore set within which each bank is expected to examine all such checks and to return such as it refuses to pay. The computation already made at the clearing house is not affected by the repudiation in this manner of checks by any bank. But each check before being placed in the box of the drawee bank is marked, for the purpose of identification, with the name of the bank presenting it through clearing; therefore the bank on which it is drawn and which refuses to pay it is able at once to send it back to the bank which brought it in and to demand a repayment of its amount to be made. If the repayment is refused for any reason the question lies wholly between the two banks, and the one on which the check was drawn has no means of satisfaction afforded by the clearing house, but must bring its suit directly at law.

A clearing house may be legally incorporated; but more commonly it is a mere private association organized among the banks to suit their own requirements and convenience. Of course the authority of such an association must be very limited. In the absence of special legislation it is impotent by its own arbitrary and original power to alter any obligation of the common law. Neither has it any authority to bind banks, which are not parties to the association, by any by-laws, rules, or usages which it may see fit to establish. Some of the regulations of the clearing house are embodied in by-laws, others are simple rules or usages which are adopted and tacitly acquiesced in by the members. There is no legal distinction between these two classes. When once the rule or usage has been established by satisfactory proof it is as binding as the formal by-law. The only practical difference is in the greater difficulty which must be experienced in proving with accuracy the existence and extent of the unexpressed custom.

The by-laws, rules, and usages are binding only upon members of the association. No outside bank is under any degree of obligation to observe them. But on the other hand no outside bank can have any remedy against any member of the association for a breach of them. They are in the nature of a contract to which the outsider is no party. The duty of adhering to them runs from each of the members to each and all the rest, but to no other person or corporation; at least unless any special and peculiar course of dealing between any member and any outside individual has operated to place that member under an express and exceptional obligation to the outsider to adhere in all matters in which he is interested to the regulations of the clearing house. Generally, "those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption and bound by them *inter sese* only." But if any bank or person not a member of the association can show that, by

virtue either of an express or an implied understanding, he did contract with a member "in reference to" such usages, he may hold the bank to the fulfilment of this special contract.

If any person or bank employs a member of the association to transact any business, such employer is neither bound by the rules, nor entitled to take advantage of and enforce them as against other members, by reason of the fact that the agent is a member. The fact of the agency does not "bring the case within the operation of the rule, that the principal is entitled to the benefit of the contract of the agent, while transacting the business of the principal. This is undoubtedly true as to all the legal rights acquired by the agent for the benefit of the principal; but" the clearing-house rules are "a mere labor-saving usage, designed for the exclusive benefit of the agent, the adoption of which could not affect the principal without his assent."

The foregoing principles were laid down in a very satisfactory opinion delivered by the Chief Justice of the Supreme Court of New Jersey;[1] and the facts of the case in support and explanation of which they were enunciated, are well worth a brief recital. The plaintiff deposited in the Bank of Commerce in New York city, a check drawn on the defendant bank, which was situated in New Jersey. The defendant, of course, was not itself a member of the New York clearing house; but it had as its agent in New York city the Ocean Bank, and it was wont to receive and pay checks drawn upon it through that bank. That bank was a member of the clearing house, and used its facilities in transacting the business of the defendant bank. The check in question came from the Bank of Commerce through the clearing house to the Ocean Bank. The rules of the clearing house required that any check which was not to be honored must be returned before ten o'clock A.M. of the day following that on which it was received through clearing; otherwise the bank on which it was drawn would be held

[1] Overman v. Hoboken City Bank, 1 Vroom, 61; 2 id. 563.

to pay it. If, therefore, this check had been drawn directly on the Ocean Bank, that bank must either have returned it before ten o'clock of the next day, or it must, according to the rules, have paid it. It was returned a whole day later than this limit with the statement that it could not be paid since the defendant had no funds of the drawer's. The plaintiff, who had lost the amount of the check by the intermediate failure of the drawer, sought to hold the defendant on the ground that since its agent was a member of the clearing house, and was uniformly wont to adhere to its rules and use its facilities in transacting the defendant's business, therefore the defendant was itself answerable for the agent's breach of such rules, and was itself liable to suffer for such breach according to the terms prescribed by those rules. Besides laying down the doctrines stated in the three preceding paragraphs which directly militated against any recovery by the plaintiff, the court further criticised the very sufficiency of the rule or usage which he set up, even if it could be applicable at all to the defendant bank, to cover the circumstances of this case. For the usage appeared to be that where a check is presented at the clearing house "to a bank against which the said check was drawn" then it must be returned within the prescribed time, or paid by such bank. But the proof in this case showed a presentation not "to the bank against which the check was drawn" but to an agent. "This is an essential difference. For such a purpose the agent does not represent the principal. The usage, if contemplating a presentation to the principal may be reasonable, and very unreasonable if extending to the agent. The plaintiff has failed to bring his case within the usage." The soundness of these remarks will be seen at once if we suppose the employing bank, the defendant in this case, instead of being close at hand in New Jersey, to have been situated in Boston or Chicago or Philadelphia. The New York agent cannot possibly know the state of the accounts of the depositors in its principal's books. It cannot properly agree or refuse to pay checks drawn upon

it, and some days must be consumed in the intercommunication, meantime the twenty-four hour rule, which appears to be arbitrary, would have concluded the distant bank from refusing to pay the check long before that bank was aware that such a check had been drawn. The practical *reductio ad absurdum* is obvious.

A case has very lately been decided in Massachusetts[1] which arose between two banks, both members of the clearing house. The rule on which it was based was embodied in a formal vote or article of the association; in the words following, to wit: "Whenever checks are sent through the clearing house, which are not good, they shall be returned by the banks receiving the same to the banks from which they were received, as soon as it shall be found that said checks are not good, and in no case shall they be returned after one o'clock." The plaintiff bank returned the check, as dishonored, to the defendant bank, which had presented it at clearing; but the messenger carrying the check did not arrive at the rooms of the defendant bank until five or seven minutes after one o'clock. The defendant bank, on the ground that the return was made too late, under the rule, refused to take back the check or to refund its amount. It did not appear, however, that the position or relations of the defendant bank to the drawer had undergone any change in the few minutes that had elapsed since one o'clock. It would have been no worse off if it had consented to receive back the check at five minutes after one than it would have been had it been obliged under the rule to receive it back at five minutes before one. The court took the view that the articles of association were in the nature of a contract between the members. If the plaintiff had not kept the check so long that it would at common law be held to have adopted it and assumed to pay it, the power to refuse to pay it, and to return it, still existed, and could be affected by the rule of the Clearing

[1] Merchants' National Bank *v.* Eagle National Bank, Massachusetts, 101 Mass. (not yet printed).

House Association only so far as it should appear that the defendant bank had suffered actual injury by reason of the delay. To the extent of such actual injury it seems that the defendant bank might be entitled to a set-off against the sum due from it on the check. Or it might pay the check, and then sue for damages for the injury caused to it by the failure of the returning bank to observe the terms of the agreement between them, and to return before one o'clock.

Had the rule or agreement gone further and declared positively and in terms, as was the fact in the case previously discussed, that if the returning bank did not return before the hour named, it should altogether forfeit the right to return at all and should be held to pay the amount of the check, the entirely different terms of the contract would have raised an entirely different issue. That an usage, or even a by-law, to this effect would be regarded as in derogation of the common law, in that it would undertake to make a bank pay the check of a drawer who had no funds to his credit; and that therefore the plaintiff would be held to make out his case with great strictness, may be gathered from the language of the New Jersey case, above cited. But from the same case it may be gathered that if the plaintiff should succeed in sufficiently proving his case the court would not deprive him of a favorable decision. Certainly there would seem to be no ground on which the courts could reasonably undertake to annul a positive and definite agreement voluntarily entered into between parties of high intelligence, and believed to work to the common advantage of all concerned.

An usage among the banks in the clearing house at London to return checks at any time before five o'clock P.M., even if they have been cancelled for payment in the usual manner by drawing a line through the drawer's signature, provided the words "cancelled by mistake" are noted upon them, has been recognized by the English courts as good and binding.[1]

[1] Fernandez v. Glynn, 1 Camp. 426, n.

The payment of checks may be affected by the use of the clearing house in one important particular. Checks, as has been seen, must be paid in the order of presentment. But when the deputy of the bank takes from its drawer in the clearing house all the checks which it has to pay, he may receive a considerable number of checks of the same depositor. It is clear that there can be no priority among these. They are all received at precisely the same moment. For the order in which they are placed in the drawer has nothing to do with the presentment of them to, or receipt of them by, the bank, indeed is really in nearly all cases unknown to the bank. The bank cannot look at their dates, for priority of presentment not of date secures priority of payment. So if the bank cannot pay all the checks of any individual depositor then coming through clearing, it must pay none of them. It has no legal power or right to select or choose from among them certain ones which it will honor, or certain ones which it will dishonor. All or none must be paid. Any other course would render the bank liable to the holders of the dishonored paper. A check presented at the counter for payment must be paid at once if there are funds enough to the drawer's credit to pay it alone; but if it is sent through clearing it must take its chance, that his funds shall be sufficient to pay not only it but all his other checks which shall be sent through clearing on the same day; and failing this it must be dishonored.

That the system of presentment through the clearing house is a legal presentment for payment to the bank on which the check is drawn — a matter which it would seem could never be doubted — has been specifically ruled in England.[1]

[1] Reynolds *v.* Chettle, 2 Camp. 596.

CHAPTER VIII.

BANK BILLS OR NOTES.

Form and Characteristics.

THE function of banks which is of the greatest public importance is that of issuing notes or bills designed to circulate in the community as current money. The power thus to issue is not inherent or essential in the banking business, and is not necessarily implied from the conference of a general power to do banking business. On the contrary it must be distinctly and in terms conferred in the incorporating act, or it will not be enjoyed.[1]

The instruments thus issued for circulation are technically and more accurately designated as bank-notes, and are ordinarily so called in England. The name bank-bills has, however, come to have the like significance, and in the United States is more frequently used in ordinary parlance. The law, even for the purpose of interpretation in criminal causes, recognizes the terms as equivalent and interchangeable.[2] A bank note or bill, so far as its language goes, is simply the promissory note of the corporation. It expresses nothing but the corporate engagement to pay a certain sum. That the payment is to be made on demand and without interest may or may not be stated. The presence of the statement is not indispensable, for it would always be deemed to be implied. But a bank-bill though in form a promissory note is yet so different from it in the purpose for which it is put forth, and the legal doctrines

[1] See the National Banking Act, sects. 8, 21, *et seq.*

[2] Eastman *v.* Commonwealth, 4 Gray, 416.

applicable to promissory notes are so far qualified in their application to bank-bills in consideration of this difference of purpose, that it seems better to regard them as distinct, though cognate, instruments. The one must be, and the other may be, negotiable by mere delivery. But the touchstone by which we can determine to which class any individual paper belongs is furnished by the question whether or not it was issued for the purpose of passing current as money for an indefinite period, in the daily transactions among the people. If it was so intended it is a bank-bill. Bank-bills are in the United States ordinarily printed on a peculiar paper, called "bank-note paper," colored or tinted in part or wholly, ornamented with vignettes, and having the figure and word designating the value printed in numerous places and in fanciful patterns upon each. But none of these features are essential to the character of the instrument as a bank-note. None of them, except the peculiar species of paper and a water-mark skilfully inserted into the texture, appear in the notes of the Bank of England. Such peculiarities have come by custom to be regarded as sufficient evidence that the document that bears them is a bank-bill. But intrinsically they have no such force in impressing this legal character. The presence of all of them would not make a document a bank-bill if it was not such in fact and was not issued to circulate as such. Neither would the absence of all of them prevent the document from being a bank-bill if its language and the object of its emission ought to render it such. A bank would have a perfect right to have all its bills written by hand on ordinary letter paper, and to print all its promissory notes on decorated bank-note paper, if it should choose, and the legal character of neither document would be affected by the fact.

A bank note or bill must be payable over the counter immediately upon demand made in business hours at any time after its issue. If it be made payable at any future time certain, or at any stated number of days after sight, though designed to

circulate after that time, it is not a bank-bill but a post-note. A post-note is of course closely like a bank-note, and at least after the time of payment has arrived, would probably be governed by the same rules rather than by the rules applicable to promissory notes. Still it is properly speaking a distinct instrument.[1] They may be issued by any bank which is empowered in general terms to issue paper for circulation, if no limitation or description of the species of paper which may be issued is added.[2]

Bank-bills are not money; that is to say they are not legal tender. They pass current as if they were money only by virtue of a general understanding or tacit agreement to that effect.[3] No State even has power to render them such by any method of legislative enactments. A law undertaking to do so would be simply void, as directly contravening Article I., Sec. 10 of the Constitution of the United States, which declares that no State shall make any thing but gold or silver coin a legal tender in payment of debts. They are, however, a good tender unless they are specially objected to at the time on the ground that they are not legal money. And though they cannot be made money or legal tender among the community generally, they may be made so as towards the bank itself which issued them. Indeed this has been not unfrequently done by several among the States.[4] But it must be done by

[1] Fulton Bank *v.* Phœnix Bank, 1 Hall, 577.

[2] Campbell *v.* Mississippi Union Bank, 6 How. (Miss.) 625.

[3] United States Bank *v.* Bank of Georgia, 10 Wheat. 333; Miller *v.* Race, 1 Burr. 457; Corbitt *v.* Bank of Smyrna, 2 Harring. 235; Handy *v.* Dibbin, 12 Johns. 220; Wright *v.* Reed, 3 Term, 554; Morris *v.* Edwards, 1 Ham. 189; Edwards *v.* Morris, id. 524; Bradley *v.* Hunt, 5 Gill & Johns. 58; Morrill *v.* Brown, 15 Pick. 177. It has been also held that a declaration averring a loss of money in bank-notes is not open to objection on the ground that bank-notes are not money. Towson *v.* Havre de Grace Bank, 6 Har. & Johns. 47.

[4] Dunlap *v.* Smith, 12 Ill. 399. But in Illinois an exception is made where the indebtedness to the bank arose upon the debtor's subscription for shares of the capital stock. This he must discharge in good money. Niagara Bank *v.* Roosevelt, 9 Cow. 409; Bailey *v.* Bacon, 26 Miss. 455; Moise *v.* Chapman, 24 Geo. 249; Commercial Bank of Columbus *v.* Thompson, 7 Sm. & Mar. 443.

statute, for in the absence of legislation there is no rule of the common law which enables a debtor to a bank to discharge himself by an offer of the amount in the bills of the bank.[1]

Set-off.

If a bank sues a debtor, the debtor may set off, subject to certain restrictions, the amount of bills of the bank held by him. Though in Massachusetts in the case cited *supra*, Hallowell and Augusta Bank *v.* Howard, it was held that the defendant could not be in a position to avail himself of the set-off until he had recovered a judgment on his bills. The right of set-off is for the nominal or face value of the bills, for it is this amount which the bank in fact owes to the holder of them. The credit of the bank may be so poor that its bills are depreciated, but this is not a matter of which the bank itself can be permitted to take advantage as against the holder. Bank-bills may still be legally circulated although they pass for less than their par value, and their legal character remains unaltered as the promise of the bank to pay a certain sum, upon the faith of which promise, at one time or another in the past, the bank has actually received that sum, and to the holder of which promise the bank still remains liable to refund that sum. If its affairs have since been so badly managed that the holder has been able, or has been obliged, to receive the bill as a representative of a less amount or value, this is not a matter which the bank can set up to diminish its indebtedness, which has long since accrued in consideration of full value received.[2]

[1] Suffolk Bank *v.* Lincoln Bank, 3 Mason, 1; Hallowell and Augusta Bank *v.* Howard, 13 Mass. 235. In the absence of any statutory provision on the subject in Massachusetts the rule of the common law necessarily governed in this case.

[2] Robinson *v.* Bealle, 26 Geo. 17; Taylor *v.* Cook, 14 Iowa, 501. Two cases in Georgia, Griffin *v.* Central Bank, 3 Kelly, 371, and Collins *v.* Central Bank, 1 id. 435, in allotting the assets of an insolvent bank declared that the claims of the bill-holders should be estimated only at the amount actually paid by them respectively for the bills, on the ground that it would be grossly inequitable for the

But though the measure of value is thus rigidly in favor of the holder of the bills, yet the right of set-off will accrue at all only under certain circumstances. If the bank is solvent the holder must have come into possession of the bills at some time prior to the institution of the suit by the bank. The date of the bills is a wholly irrelevant matter.[1] The defendant's right of action is an original one accruing to him directly and primarily at the moment when he becomes the bearer of the bills. He does not take the contract as assignee of the former holder who pays over the bills to him. No holder has any thing to do with the possession or rights of any predecessor in possession. No connection or relationship of a legal character arises between them by reason of the naked act of transmission. The promise of the bank is to pay to the bearer. Whoever is, for the time being, the bearer, is the direct contractor with the bank, and may maintain his suit against it upon the original promise running to himself. He is no more affected with the legal rights or liabilities of an assignee than he would have been had the issue of the bill by the bank been made directly to him in the first place.[2] He does not therefore succeed to a pre-existing right of action against the bank which he can use as a set-off in a pre-existing suit of the bank against himself. But he comes into possession of an original right of action which he cannot set off in a suit already pending at the time when he acquires it. Also it has been questioned whether if the claim is only nominally that of the bank, and is in fact

bill-holders, who had paid only ten cents on the dollar for their bills, to be allowed to exhaust the entire fund which was coming to the creditors to the exclusion of persons who had given cent per cent in labor or property. Bill-holders of course could only "exhaust the fund to the exclusion of others" when they were entitled to priority of payment. In such cases the effect seems certainly grossly inequitable, as the court thought it. But it is obviously a matter to be dealt with by the legislature. The judge cited no authority in his opinion, and the law is certainly as laid down in the text.

[1] Jefferson County Bank v. Chapman, 19 Johns. 322; Carpenter v. Butterfield, 3 Johns. Ca. 145; Dickson v. Evans, 6 Term, 57.

[2] Bullard v. Bell, 1 Mason, 243.

prosecuted for the benefit of an independent third party, the set-off of bank-bills would be allowed.[1]

If the bank is insolvent, the bill-holder can set off the amount of bills held by him for their full nominal or face value, provided he had come into possession of them prior to the insolvency.[2] It has been said that if any legislation exists providing for equality in the payment of bill-holders, this right of set-off is in derogation of it. But nevertheless the right is not taken away or diminished by reason of this clashing or inconsistency, which only furnishes an additional reason for the stringent enforcement of the rule requiring the possession to have been acquired prior to the insolvency.[3]

Some questions may arise as to when the taker or purchaser of the bills is to be affected by knowledge of the bank's insolvency. No precise and definite rule has been laid down concerning this matter. The relationship existing between the individual and the bank might not unreasonably have some bearing and effect in the determination of the point in any particular case. Thus a director obtaining bills of the bank at a discount, at a time when he himself is indebted to the bank, and also when by reason of his office he knows or ought to know that the bank is thoroughly insolvent, might well be refused the privilege of using these bills in set-off against such indebtedness; though an outsider having no such knowledge, and obtaining bills at the same time, also at a discount, but in due course of business, might be allowed to do so.[4] The director could hardly be fairly deemed a *bona fide* holder, for this purpose. In an early case in New York it was declared that the mere refusal of the bank to pay specie, and the consequent stoppage of its bills, were not alone sufficient proof of insolvency to deprive a subsequent *bona fide* holder of its bills of his right to set them off. The court based their decision upon

[1] Hallowell and Augusta Bank *v.* Howard, 13 Mass. 285.

[2] Bruyn *v.* Receiver, 9 Cow. 413, *n.*; Haxtun *v.* Bishop, 3 Wend. 13; Diven *v.* Phelps, 34 Barb. 224.

[3] Clarke *v.* Hawkins, 5 R. I. 219.

[4] Ibid.

the view that these facts did not alone indicate a suspension of the banking business and an absolute deficiency of assets to meet the liabilities of the corporation, but might very probably be the result of mere temporary embarrassment and want of available funds growing out of the financial condition of the country.[1] In a later case in the same State, where it appeared that the bank had closed its doors, and had for all practical purposes suspended business altogether, it was held that the taker of its bills after these occurrences could not use them in set-off.[2] There seems to be that degree of sound argument in both of these cases that it is hard to say that either of them is wrongly decided. At the same time they are open to the objection that it is difficult to draw from them any general principle which shall be of universal and satisfactory operation. Many instances must arise in which it will be very hard to say whether or not the suspension of the bank is sufficiently complete to amount to notice of insolvency in fact. Farther, the person who takes the bills may not know precisely what is the extent, or what are the circumstances, of the suspension. In short, the test which, if any, can alone be drawn from these rulings, is one which is open to many practical objections. We shall therefore take the liberty to suggest what seems to us a better one. Though it has not been supported by judicial adoption, yet it has never been passed upon by way of rejection in any cause, so far as we have discovered. It is therefore to be fairly considered as open in the future either to acceptance or rejection. It is simply this, that so long as the bills continue to be taken and paid away by the community in general, like the bills of other banks, that is to say, so long as they continue in actual circulation *as money*, so long any person taking them as money should retain the right to set them off against the bank. When they no longer circulate *as money*, having a fixed value, but can only be passed by way of barter or exchange, becoming the sub-

[1] Jefferson County Bank *v.* Chapman, 19 Johns. 322.

[2] Diven *v.* Phelps, 34 Barb. 224.

ject in each case of a special bargain as concerns the valuation at which they shall be received, then it is time to say that the taker can no longer set them off for their full face value. The manner in which they are treated by people generally, and the manner in which any individual actually comes by them, are the two elements of determination. As a matter of fact, in cases which apparently resemble that in 19 Johnson (*supra*), we continually see bills circulating actively at a moderate discount, the taker always having a claim upon them against the bank for the full amount, and the bank doing a business as large and as brisk as usual. Such bills are always recognized by the courts as *money* to their nominal value. If taken on deposit, the bank customarily gives credit for so many dollars, and the debt is for so many dollars. The case is precisely that of the first of the two New York cases. The bank is so situated that it cannot conveniently, or perhaps safely, redeem at once upon presentment in specie or legal tender; but its substantial and ultimate solvency is by no means therefore despaired of. Even its present positive insolvency is by no means proved. The public all take its promises to pay with only a slight discount to represent the value of the delay, and of course also of the *possible* doubt attendant upon any delay, which must precede payment by the promisor. Any person taking one of these promises under these circumstances ought to be able to use it in set-off, as well as to sue upon it, in both cases for the full nominal value. But when the bank has come to that degree of embarrassment that it has to suspend business; or when the public become aware of what they deem a hopeless degree of insufficiency in its assets and desperation in its affairs, whether indicated by the actual shutting of doors or by other facts and symptoms which the people at large consider equally conclusive; then the bills will naturally fall out of circulation *as money*, at any fixed value, and will be taken as a matter of bargain, and more or less of speculation. They lose their traits as money; usage no longer makes it unusual or apparently dis-

courteous in any man to refuse to accept them as such. At this stage, and not before, it would seem to be time to deprive the subsequent taker of the privilege of securing to himself a considerable advantage over other debtors through the medium of a right of set-off.

Note payable in Bank-bills.

Where the bank is the holder of a note, which is, in terms, made payable in its own bills, if it sues thereon it shall recover for the full face value of the note, without regard to the merchantable value. For even after the issue of execution the debtor can discharge the debt by a payment or tender of the bills of the bank.[1] Though it would seem that the judgment must in such a case express the fact that such a payment or tender shall operate to discharge the defendant; inasmuch as otherwise a simple judgment, given for so much money, could not legally be thus satisfied, even as towards the bank itself, much less as towards any assignee of the bank, except of course by common consent.

Statute of Limitations.

A bank-note is not subject to the running of the Statute of Limitations, as any other simple indebtedness, or promise to pay would be, although the bill is not distinguishable in form from such a promise. Its purpose of circulation necessarily involves this result. Every time that it is reissued by the bank the promise is renewed, and it must usually be impossible in the case of any particular bill to say how often it has passed into, and again has been paid out by, the bank, or when it was last so paid out. But even if in any individual case it could be shown that the last issue was at a time so long past that the period of the statute has since elapsed, yet another objection, which goes to the root of the matter, still remains behind. For

[1] Abbott *v.* Agricultural Bank, 11 Sm. & Mar. 405.

lapse of time, in the case of these instruments, affords no presumption of their having been paid. On the contrary, their existence in other hands than those of the bank, is at least *prima facie* evidence of non-payment, since they are never paid, and generally speaking payment can never be enforced upon them at law, unless they are surrendered to the promisor.[1] Further, as already shown, a new contract and a new cause of action is created by each transfer, so that the statute could begin to run only from the time when the last holder came into possession.

Presentment and Demand.

If a bank-note is made payable generally, suit may be brought upon it without prior demand. Where bills are made payable at any particular place, as at the banking-house of the corporation, the rule is still somewhat doubtful. It has been held in Georgia that demand at that place must be averred and proved.[2] In other decisions it has been asserted that the suit may still be sustained, even though no demand has been made; but that if the bank brings the money into court and shows its ability and willingness to have paid, had presentment been made at the place named, then it shall lose neither interest nor costs.[3]

If demand be necessary at all, it must be made at the place designated upon the face of the instrument. Even if that place be other than the corporate banking-house, the rule is unaffected by this fact, and demand at the banking-house cannot be substituted for demand at the place named.[4]

1 Hinsdale *v.* Larned, 16 Mass. 70; Rev. Stat. c. 120, § 4.

2 Dougherty *v.* Western Bank, 13 Geo. 287.

3 State Bank *v.* Van Horn, 1 South. 382; Haxtun *v.* Bishop, 3 Wend. 13; Bryant *v.* Damariscotta Bank, 18 Me. 240; Bank of Niagara *v.* McCracken, 18 Johns. 495; where the individual opinion of the judge (Woodworth) was thus stated, but no decision by the court was either needed or given. See Jefferson County Bank *v.* Chapman, 19 id. 324; Bank of Kentucky *v.* Hickey, 4 Litt. 225

4 King *v.* Dedham Bank, 15 Mass. 447; Ware *v.* Street, 2 Head, 609.

The course has often been adopted of requiring, through statutes, that banks putting bills in circulation shall deposit with some public officer bonds or stocks as security for the ultimate redemption of these bills. The same legislation also usually designates the manner in which these securities may, upon occasion, be resorted to, usually through the medium of the same State official who receives them. But provisions of this description have no effect upon the right of the bill-holder to sue the bank directly, unless some restriction is expressly imposed in terms in the law itself. The legislative security is not given instead of, but in addition to, the holder's private right of action. It is collateral to that right and cumulative; but does not supersede it. Neither is the bill-holder's right to sue for any balance remaining due to him, infringed by the fact that he has received as large a dividend upon his claim as the State officer is able to pay from the securities deposited. He is entitled to payment in full. In his suit to recover the unsatisfied balance, he will be held simply to show how much he has already had paid to him from the official source, and will not have to go into the matter of the sufficiency or correctness of the official's proceedings. Nor will he be in any way affected by the assertion or proof of their insufficiency or incorrectness.[1]

If the bank becomes insolvent, it is well to make a demand. For where interest upon claims on bank-notes is allowed at all, the current of authority seems to be in favor of the rule of calculating it only from the time of the demand, and not from the date of the suspension or of the commencement of proceedings in insolvency. There seems no sound reason for making a distinction in this doctrine by reason of the fact that the bills are or are not made payable at any particular place. If no place is named, the assumption must be that payment will be made at the banking-house. It is natural for the holder to demand payment there; and therefore, if demand would

[1] Conwell v. Hill, 14 Ind. 181.

otherwise be necessary in order to make the interest begin to run, it ought also to be necessary though the bill is not in terms made payable at any especial place. The date of the bill has nothing whatsoever to do with the matter; it can never, simply as such, be taken as the starting-point in the reckoning of interest.[1] Indeed, the date of a bank-bill is a matter of very little moment. As has been seen, it does not afford a basis for the calculation under the Statute of Limitations; and evidence may at any time be introduced to show that it was not in fact executed or issued by the bank until long after its nominal date.[2]

Redemption.

There is no necessity for a separate presentment and demand upon each separate bill. The presentment of a package is perfectly proper.[3] But for the purpose of determining in what description of coin, and in how many pieces of each respective denomination, payment may be legally tendered by the bank, it has a right to treat each bill as a distinct demand.[4] An artifice, which is often resorted to by banks when short of funds, is to delay payment upon the bills presented as much as possible by the exercise of every method of exhausting time which the ingenuity of the officers can invent. The employment of only a single official, the inspection by him with affected accuracy and minuteness of each individual bill presented, the slow counting out by him of the smallest coins in which payment can be legally made, are all familiar devices by which banks hard pressed not unfrequently seek relief. Such proceedings have been uniformly and resolutely condemned by

[1] Ringo v. Trustees of Real Estate Bank, 8 Eng. 563; Bank Commissioners v. Lafayette Bank, 4 Edw. Ch. 287. But in Ohio, interest has been allowed from the date of suspension of specie payment. Atwood v. Bank of Chillicothe, 10 Ohio, 526.

[2] Selfridge v. Northampton Bank, 8 Watts & S. 320.

[3] Reapers' Bank v. Willard, 24 Ill. 433.

[4] Boatman's Savings Institution v. Bank of Missouri, 33 Mis. 497.

the courts. The duty and undertaking of the bank is not alone to redeem its bills, but to redeem them with reasonable despatch; and intentional dilatoriness is a clear breach of the obligation. What is reasonable despatch is a point of course incapable of accurate abstract definition. No precise number of officers can be declared to be necessary, and no precise number of minutes or seconds can be arbitrarily allotted as proper for the payment of a certain number of bills. The bank is entitled to an opportunity to satisfy itself of the genuineness of the bills before it pays them. But unless some peculiar circumstances give rise to unusual suspicions, it is expected to be able to do this with considerable expedition. In each particular case the court will look at all the circumstances, and will from them infer the *animus* of the bank. If the design appears to have been evasive, and an effort on the part of the bank to create delay simply as such and in order to secure its own selfish advantage, then, though the officers have scrupulously observed the technical requirements of the law, though they have never refused redemption, but have maintained a steady payment, they will not be absolved from the just result of their really unfair conduct. The non-infringement of the letter of the law will not cover the real infringement of its spirit. The proceedings will be regarded as tantamount to a deliberate refusal in terms on the part of the corporation to redeem its circulation on demand. Though the officers may have carefully reiterated their intention to redeem, yet the testimony of facts will outweigh that of words. But if the *bona fide* intent was apparent to redeem the bills with sufficient rapidity, and according to the usual course of banks in this department, then the bank could be held only upon the ground of a culpable deficiency in its arrangements and facilities, amounting to, and for which it would be liable as, gross negligence.[1]

[1] Suffolk Bank *v.* Lincoln Bank, 3 Mason, 1; Reapers' Bank *v.* Willard, 24 Ill. 433; People *v.* State Treasurer, 4 Mich. 27.

As a general rule banks are entitled to the benefit of the limitation of bank hours. It is absolutely necessary that they should have some of the afternoon hours free from the interruptions, and even more from the constant changes in their accounts and money matters, unavoidably produced by the transactions of business. But an effort to take advantage of bank hours, which is clearly evasive of a reasonable duty, will not be protected. Thus, if a parcel of bills be presented just before the close of bank hours for redemption, a refusal to redeem simply because the transaction could not be wholly completed before the hour would be unjustifiable; but if it would necessitate the trespassing to a substantial and really inconvenient extent into the afternoon period of office labor, then the refusal would be proper. The criterion of reasonableness will be applied in all such cases, and only within its protection will the rule of banking hours be recognized and respected.[1]

Payment of Lost or Destroyed Bank-notes.

Ordinarily payment upon a bank bill or note is conditional upon its surrender. Four classes of cases have arisen in which payment has been sought to be enforced without an offer of surrender; viz., where there has been, 1, destruction of the whole bill; 2, loss of the whole bill; 3, destruction of a part of the bill; and, 4, loss of a part of the bill.

I. *Destruction of the whole bill.* The least difficulty is encountered in laying down the rule in this case. It cannot be questioned that if the total and absolute destruction of the bills can be shown, the last holder or owner of them, he who was entitled to demand payment upon them at the time of the destruction, can recover from the bank; not of course upon the instruments themselves, which must be offered for surrender as preliminary to collection upon them, but upon the original promise of the bank of which they were the documentary

[1] Suffolk Bank *v.* Lincoln Bank, 3 Mason, 1; People *v.* State Treasurer, 24 Ill. 433.

evidence. This rule is perfectly established, and the difficulty arising in cases of destruction does not grow out of any doubtfulness concerning it, but out of the stringent rules which are applied to the sufficiency of the evidence offered by the plaintiff. It is obvious that the bank must always labor under extreme disadvantages in suits of this character, and the courts have made it their task to surround it with such substantial protection as the nature of the case permits. It is probable that in the great bulk of such cases the bank would be without any possible means of disproving either the plaintiff's possession, or the alleged destruction of the bills, even though the entire story were false. Beyond the testimony to these points therefore he is further held to considerable accuracy in the secondary evidence, descriptive of the bills and notes asserted to have been destroyed. Proof of destruction of bills and notes is not enough; it must be proof of the destruction of *specific* bills and notes, and this can be accomplished only by means of a description of each one of them. Evidence adduced by the plaintiff and naturally uncontroverted by the bank, that he had lost in a fire a parcel of the circulating bills of the bank amounting in all to a certain sum is insufficient, for it would not serve as an identification of the bills, nor enable the bank to protect itself against them should the destruction at any time afterward appear not to have been accomplished. The same impossibility of identifying the bills would render it also impossible to give to the bank any sufficient bond of indemnity against reappearance. For no particular bills could be described in such a bond. It was well observed in the Massachusetts case cited, that "the defendants have not contracted to redeem their bills, except upon their production and delivery; and it is the negligence or misfortune of the plaintiff that they cannot be produced. The plaintiff is then bound to furnish an equivalent; to put the defendants in as good a position as if the bills were produced. If he cannot do this he has no right to shift the consequences of the loss upon a party in no-

wise answerable for it. . . . Upon the whole matter, the court are of opinion that to permit a plaintiff to recover . . . upon bills circulating as currency and available to any one taking them *bona fide*, without such means of distinguishing the particular bills as would admit of an adequate indemnity, would open a wide door to fraud, would be incompatible with the reasonable security and rights of the defendants, and is not required by law." The whole opinion in this cause, delivered by Judge (since United States Attorney General) Hoar is very satisfactory and conclusive. It will be observed however that the doctrine first laid down in this paragraph is not at all impeached by this or any other of the cases cited, the result of all of which is to be referred wholly to the fact that in all of them the respective plaintiffs were unable to identify the destroyed bills. Had they been able to do so, by describing the mark of the issue and the numbers of the bills, so that they could have executed a sufficient bond of indemnity against their future reappearance, they could have recovered upon them, and possibly even without being held to give such a bond, which is in none of these cases asserted to be indispensable,[1] and in that cited from the Alabama Reports is distinctly stated to be needless. The theory of the law would not require it. The right to recover on the original indebtedness ought to be perfect upon satisfactory proof of destruction. The requirement of a bond would seem to be matter of equity rather than law. Yet so just and reasonable does it seem, that the courts of law are sometimes willing to enforce it.

The description, whether by number and mark of issue or other means of identification, is mere matter of proof upon the trial. It need not be set forth in the pleadings; and a declaration describing only a certain number of the notes

[1] Tower *v.* Appleton Bank, 3 Allen, 387; Burridge *v.* Geauga Bank, Wright (Ohio), 688; Bank of Mobile *v.* Meagher, 33 Ala. 622; Bank of Louisville *v.* Summers, 14 B. Monr. 306; Hagerstown Bank *v.* Adams' Express Co., 45 Penn. St. 419; Hinsdale *v.* Bank of Orange, 6 Wend. 378.

or bills of a certain bank and of a certain denomination is sufficient.[1]

II. *Loss of the whole bill.* In this case it cannot be doubted that the loser could have no right to demand payment of the original debt from the bank. It may be properly considered that so long as the bill in a perfect condition, that is to say not materially mutilated, continues to exist, the original debt is inseparable from it. It is only after it has been destroyed either wholly or to such an extent that it has lost its negotiability, that the right to sue upon the original indebtedness accrues. For bank-notes notoriously pass by delivery. Any person who takes them *bona fide* for value has a claim against the bank for their amount, which is unaffected by any previous circumstance in the chain of title. This being the case therefore it is clear that the bank may be called upon to pay twice over if it can be held to pay both the loser and a subsequent *bona fide* holder. There is no reason why the bank should be subjected to a gross and obvious injustice simply to relieve the loser from a hardship or misfortune. Neither is it possible to give a satisfactory bond of indemnity. Even supposing, which could rarely happen, that the loser could so accurately describe the bills that they could be identified and distinguished from all others of the same issue, still the bank would be obliged to pay them to any *bona fide* holder who presented them, and it is not likely that they would be presented at the counter for redemption by any other party. The thief or the finder would hardly resort to this means of securing the profit of his booty. Even if it could be supposed that he would do so, still it would be imposing upon the bank an onerous duty, growing out of no negligence or misconduct on its own part, to require it to watch for and detect the wrong-doers. Adjudicated cases support this view.[2] But there has been very little discussion of

[1] Carey *v.* Greene, 7 Geo. 79.

[2] Hinsdale *v.* Bank of Orange, 6 Wend. 378; Martin *v.* Bank of United States, 4 Wash. C. C. 253.

the subject, rather one would think because it was so plain that it left no room for doubt than from any deficiency in opportunity or temptation to institute such suits. Yet strange to say one State has adorned its judicial annals with decisions to the contrary effect.[1] However amusing may be the rhetoric of the court in the earlier of the two causes cited, it is impossible to pretend that they are entitled to be deemed legal authorities. To support this criticism it is needful only to give in the judge's own language the consideration upon which he was content to base his ruling: "It would be difficult for any ingenuity to designate a happy casualty by which he (the owner) could flatter himself with the hope of his having them restored." We are constrained to doubt the conclusiveness of this gracefully phrased argument. Some stress is laid in this case upon the fact that the plaintiff and loser had published, apparently in the newspapers, notice of his loss and of his claim to the bills. The legal effect of such publication has never been judicially declared. But it cannot be conceived that any practical advantage would be likely to accrue from it. No court would of course regard it as constructive notice to any particular member of the community;[2] and to bring home to him actual knowledge by showing that he had read the notice and that he knew or ought to have known from it that at the time he took the bills they were the identical ones therein described, would require such a rare combination of lucky circumstances as it is quite inconceivable should ever occur. Notice of the loss of a certain number of bills of a certain denomination issued by a certain bank would of course be utterly meaningless. No individual bills would be described thereby, and the circulation of the entire issue could not be stayed because an individual had met with a loss.

[1] Waters v. Bank of Georgia, R. M. Charlt. 193; Robinson v. Bank of Darien, 18 Geo. 65. This case adds the important proviso that suitable indemnity must be tendered by the plaintiff. As we have taken pains to show in the text a really efficient indemnity may be regarded as a practical impossibility.

[2] Bank of United States v. Sill, 5 Conn. 106.

III and IV. *Destruction of a part of the bill; loss of a part of the bill.* These two may be considered together, for they both rest upon the same general principle. That principle is that a piece or fraction only of a bank-bill is non-negotiable. Negotiability is an attribute of the bill as a whole. When it has been severed into parts this quality pertains to no one of them. They are not even payable *pro tanto*, according to the ratio of the size of the part to the whole. Any person who takes a piece, takes it subject to all the equities which burdened it in the hands of the party transferring it. It makes no difference whether or not value has been parted with by the holder in exchange for it. It must be traced back through the series of intermediate holders until it is brought into the hands of the first person who received it in its fractional condition. If he came by it dishonestly, or if he found it and so parted with no value in exchange for it, then this imperfection in his title adheres to it throughout its entire subsequent career, and no recovery can be had upon it. Hence it is obvious that the bank can never be held to pay more than once upon one bill. Only the original owner who was entitled to the whole bill could show a good title and he only could recover. There seems therefore to be no sound reason why any person presenting a fragment of a bill and proving conclusively his ownership of the whole bill, could the remainder of it be produced, should not be allowed to recover its full amount. For there can be no other true owner of the entire bill, and no one who cannot prove himself such can ever recover. But claims of this description would seem to be peculiarly proper for demanding that indemnity be given to the bank, and it will be seen on examination of the cases cited below that it is generally expected. The obstacle of difficulty in identification no longer exists; and cases can easily be conceived in which it might appear after the bank had made the payment, that an imposition had been successfully practised. The proper privilege of the bank is to require surrender of the whole bill before paying it, and

if this privilege is taken away in any peculiar case, every safeguard against conceivable injury in consequence should be given in its stead. We have stated the doctrine as it seems to us and as it is laid down by many weighty authorities.[1] Especially conclusive is the reasoning of Judge Marcy in Hinsdale *v.* Bank of Orange. Lord Ellenborough had expressed the opinion that the rightful owner of the whole bill, holding a half only, could not maintain his action because the other half might come into the hands of a *bona fide* holder who could sue; and so two recoveries might be had.[2] But, says Judge Marcy, this implies the negotiability of the second half. If it is non-negotiable, of course it can never come into the hands of a *bona fide* holder, and Lord Ellenborough's supposed difficulty can never arise: that it is non-negotiable "is as clear to my mind as the proposition is certain that a part is not equal to the whole." Certainly the impression in the community is so general to the same effect, that it would be difficult to imagine that any person could in real honesty and good faith receive a half of a bank-bill as money. To the same effect, and very excellently put, is the decision cited from 4 Washington C. C. Reports.

The custom of severing bank-bills to send them more safely by mail has been so common, that cases where one-half was either lost or destroyed have been of frequent occurrence; and were it not for the ruling of Lord Ellenborough there would be no break in the uniform maintenance of the doctrine above laid down. As it is, a comparison of the reasoning upon the one side, and the other is clearly in its favor, and the authorities which support it are so abundant that it ought not to be

[1] Hinsdale *v.* Bank of Orange, 6 Wend. 378; State Bank *v.* Aersten, 3 Scam. 135; Commercial Bank *v.* Benedict, 18 B. Monr. 307; Northern Bank *v.* Farmers' Bank, id. 506; Patton *v.* State Bank, 2 N. & M. 464; Armat *v.* Union Bank, id. 471, n.; United States Bank *v.* Sill, 5 Conn. 106; Bullet *v.* Bank of Pennsylvania, 2 Wash. C. C. 172; Martin *v.* Bank of the United States, 4 id. 253; Bank of Virginia *v.* Ward, 6 Munf. 166; Farmers' Bank *v.* Reynolds, 4 Rand. 186.

[2] Mayor *v.* Johnson, 3 Camp. 324.

any longer open to question. If it is correct, it follows that it makes no difference whether the missing half has been utterly destroyed or only lost. The effect of the two facts upon the right of the lawful owner to recover is precisely the same. But if the contrary doctrine, as asserted by Lord Ellenborough, is to be sustained, then a material distinction will be established between the two classes of cases. Upon proof of utter destruction of all parts of the bill save that presented for redemption, the holder of that part must be allowed to recover; if not upon it, yet upon the original indebtedness. Clearly the analogy of the case of destruction of the whole must govern. But if only a loss of the other parts be proved, then the holder of the part presented cannot recover, for precisely the same reasons that he could not do so had he lost the whole bill. The theory then adopted is that the other part or parts are as negotiable as the whole, and of course the same rule applies to both cases.

The holder of a part is never entitled to a proportionate payment. The indebtedness is indivisible. Some one person is entitled to the whole, and no other person can be entitled to any thing less.[1]

An effort has sometimes been made by banks to save themselves altogether from the necessity of ever paying upon any portion, less than the whole, of a bill, by publishing the statement that they will not hold themselves liable upon severed bills, and by otherwise using such means as are in their power to notify the community generally of this purpose. But such attempts are utterly impotent towards effecting the desired immunity. The bank is simply a party to the contract to which the rightful owner is the other party. Neither can, by a simple proclamation of its wishes or intentions, injuriously affect the rights which the law gives to the other under the contract and as an essential part of it. The sole exception must lie in the express assent of the other party, and his consequent voluntary abandonment of his rights, which would

[1] Farmers' Bank v. Reynolds, 4 Rand. 186.

have to be affirmatively shown. So improbable an inference as against the bill-holder will never be based solely upon the simple fact of the declarations made by the bank, and published by it in newspapers.[1]

When the plaintiff in a suit upon a bank-bill recovers, he is entitled only to the amount of the bill and interest thereon, which as above stated, must apparently be calculated from the time of his making an actual demand for redemption, and the ordinary costs of court. Incidental damages can never be allowed.[2]

If several firms undertake to issue bills for circulation, stating that any one of the firms will redeem, the firms are severally liable upon every bill so issued which does not designate in terms by which firm it will be paid.[3]

Title and Suits.

It is familiar that the title in bank-notes passes by mere delivery. It has also been seen that the receiver of bills has the position of an original promisee of the bank. He does not take, as by an assignment, only the title of the person paying them over to him.[4] He need only receive them in the usual course of business for a full and fair consideration and in good faith. His title is then unimpeachable by any party though they may have been put in circulation fraudulently, or may have been stolen from the bank or from a subsequent holder.[5] Hence it follows as a rule of law that possession is *prima facie* evidence of title. The holder may sue the bank and recover simply by virtue of such possession, unless the bank can show by positive proof that the possession was obtained *mala fide*. The

[1] Martin *v.* Bank of the United States, 4 Wash. C. C. 253; United States Bank *v.* Sill, 5 Conn. 106.

[2] Bank of St. Mary's *v.* St. John, 25 Ala. 566.

[3] Taylor *v.* Cook, 14 Iowa, 501.

[4] *Ante*, p. 4.

[5] Bay *v.* Coddington, 5 Johns. Ch. 54, and cases there cited; White *v.* How, 3 McLean, 111; Robinson *v.* Bank of Darien, 18 Geo. 65; Maury *v.* Ingraham, 28 Miss. 171. Also see especially Goldsmid *v.* Lewis County Bank, 12 Barb. 407.

bank may always safely pay the holder and will discharge itself thereby, unless it knows, or has sufficient reason to know, that the possession was fraudulently come by.[1] But the mere fact that the bills have passed through the hands of a *bona fide* owner since the theft or fraud does not wholly wipe out its effect. Such a holder cannot transmit a pure title to one receiving them from him with notice of the facts.[2]

Bank-bills are now usually made payable to bearer, though sometimes they are expressed to be payable to A. B. (naming some person who may be either real or fictitious) or bearer. The rights of the holder are not in any shape affected by the use of the latter form. Bills so written are for all purposes precisely the same as if they had been made simply payable to bearer. In a suit upon such a bill once instituted in one of the United States courts it was argued, that the person named might not have been competent to sue the defendants in those courts. The objection was disposed of by the Supreme Court of the United States with the remark, "This court has uniformly held that a note payable to bearer is payable to anybody and not affected by the disabilities of the nominal payee.[3]

Bill-holders; their Rights and Privileges.

It has been said, and with evident justice, that bill-holders ought to be entitled to protection in preference over other creditors of the bank. They are in fact the public; and though they are not legally obliged to receive bank-bills in payment, yet custom and courtesy make it in most cases morally obligatory upon them to do so, such being the ordinary and universal course of dealing between man and man. They are not, like most of its other creditors, dealing with the bank with the expectation of mutual advantage. But obvious as is the pro-

[1] New Hope and Delaware Bridge Co. *v.* Perry, 11 Ill. 467.

[2] Olmstead *v.* Winstead Bank, 32 Conn. 278.

[3] Bank of the Commonwealth of Kentucky *v.* Wister, 2 Pet. 318; Bullard *v.* Bell, 1 Mason, C. C. 243.

priety of affording a preferential protection to the community at large in the persons of those who may at any time happen to be the holders of bills of a failed bank, yet it is a matter which can only be accomplished through the medium of legislation. In default of statutory provisions the law, as administered by judges, is impotent in the premises, and the bill-holders occupy a like position with all other classes of creditors.[1] Laws however have not unfrequently been passed for the purpose of correcting this evil; and the shareholders have been declared liable, to a greater or less extent, to contribution for the benefit of the owners of the circulating paper.[2] The litigation under such statutes has been very much less than might have been expected. The course and result of that which has arisen has necessarily depended in each case very much upon the peculiar language of the law. It is fully discussed in the chapter on "Shares and Shareholders."

An irregularity in the original organization of the corporation, which, had the matter been pressed, might at any time have resulted in the forfeiture of the charter, will not operate to relieve the shareholders from their liability for the ultimate redemption of the circulating notes.[3] But any individual shareholder who took any part in the irregular organization cannot recover any thing from another shareholder upon any notes he himself may happen to hold.[4]

If a bank, for the purpose of redeeming its circulating paper, makes a valid assignment of assets sufficient for that purpose, it is incumbent upon the shareholders, who are ultimately liable for the redemption, to keep such supervision as may be deemed requisite over the transactions of the assignees. If these persons embezzle or misappropriate or waste the assets, the shareholders still remain liable to make good the deficiency.

[1] Cochituate Bank v. Colt, 1 Gray, 382.

[2] Robinson v. Bank of Darien, 18 Geo. 65; Grew v. Breed, 10 Met. 569; Cochituate Bank v. Colt, 1 Gray, 382.

[3] McDougald v. Bellamy, 18 Geo. 411; McDougald v. Lane, id. 444.

[4] Robinson v. Lane, 19 Geo. 337.

The assignees are in fact agents of the shareholders. The bill-holders are merely beneficiaries, without being active parties to the arrangement or able to veto it; they are accordingly under no obligation to maintain any watch over the assignees, and will not be required to suffer for their default.[1]

If the charter or the organic law reserves a power to the legislature to alter or modify any of the provisions of such charter or law, a statute may at any time afterward be legally passed to render the shareholders liable for the circulation. The reservation in the charter or law prevents the subsequent enactment from being unconstitutional. It has been also held that if the natural construction of the later statute expresses a clear intention to cover all corporations which it can legally cover, all those which were capable of such modification would be considered as coming within its terms.[2]

Unfaithful management on the part of the bank officials, which renders them liable to the corporators, does not necessarily, perhaps ever, render them also liable to the bill-holders.[3] Even if they could be held to such a liability, the Statute of Limitations will run in their favor. If the statutory period has elapsed since the malfeasance or negligence took place, *a fortiori* if it has elapsed since the failure or stoppage of the bank, the liability will be at an end.[4]

A bank-bill stolen from the bank and fraudulently put in circulation is good as against the bank in the hands of any *bona fide* holder for value, provided the bill was completed in its execution as an instrument at the time of the theft. But if it was incomplete in any material respect and this defect was fraudulently supplied subsequently to the robbery, then its redemption cannot be enforced.[5] The cited case was argued

[1] Robinson *v.* Lane, 19 Geo. 337.

[2] Reciprocity Bank, 29 Barb. 369; 22 N. Y. 9.

[3] Branch *v.* Roberts, 50 Barb. 435.

[4] Hinsdale *v.* Larned, 16 Mass. 70.

[5] Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Gloucester Bank *v.* Salem Bank, id. 33.

by eminent counsel, and excited unusual interest at the time. The bills sued upon had been completed in every respect with the sole exception of the president's signature. In this condition they were put away in the cashier's desk, a place of very slight security, and were thence stolen; the president's signature was forged, and they were placed in circulation. The plaintiffs, among other arguments, urged that the bank should be held liable on the ground that it had been guilty of gross negligence in leaving the bills thus exposed when they were in a state so nearly perfect. But the court held that no case was made out. The fact that the independent crime of forgery necessarily intervened between the theft and the issuing, and was indispensable to the possibility of issuing, rendered it impossible to hold the bank.

Bills which have been improperly pledged to a creditor of the bank, as security, with the distinct understanding that they shall not be put in circulation, but shall be held strictly by way of security, do not constitute a part of the circulating paper of the bank. The pledgee is not a bill-holder, and is not entitled to any of the rights or privileges which are accorded to bill-holders. He cannot use the bills, as bills; but must come in as an ordinary creditor, on his debt.[1]

Miscellaneous Rulings.

Statutory provisions restricting banks from issuing the bills of banks not incorporated within the same State have been quite common. In their absence a bank may of course pass over its counter and circulate any species of money, not absolutely illegal, which the customer will take.[2] Such laws do not, however, prevent the sale of foreign bills by one bank to another, simply for the purpose of facilitating their redemption.[3] But if a bank in another State establishes, in a State

[1] Davenport *v.* City Bank of Buffalo, 9 Paige, 12.
[2] Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.
[3] Buffalo City Bank *v.* Codd, 25 N. Y. 163.

where such legislation exists, an agency to discount bills with its own bank-notes, this would be a violation of the law. The bank would acquire no title to the bills so discounted and could not maintain a suit for their collection.[1] A much finer distinction was drawn in a case decided in the State courts of Alabama,[2] a distinction which seems rather too subtle to be generally adopted, but which shall be given for consideration. A banking company, it was held, receiving from a foreign banking corporation bills of that corporation, upon *general* deposit, would be entitled to pay them out again, since they would be simply its own money. Neither would it make any difference that it had agreed with the foreign bank to redeem all such bills presented at its counter. It is not the agent of the foreign bank to "issue" such bills, in which case there would certainly be a violation of the statute. The decision, it was intimated, might have been different had the declaration alleged a *special* deposit of these bills to the end that they should be paid out as money for the benefit of the depositor.

Where the same law in one section declares it to be a misdemeanor to "pass or receive" notes below a certain denomination, and in another section inflicts the penalty of a fine upon a bank which "makes or issues" such, the former section does not apply to a bank paying such over its counter. The latter section is exclusive of the other and can alone be enforced against the corporation.[3]

A statute "to prohibit" the issuing and circulating of unauthorized bank paper, creates a liability in tort, and not in contract, for its breach.[4]

Bank-bills are circulated upon the credit of the bank which issues them, not upon that of any individual who pays them over to another. Hence it follows that there is no warranty of

[1] Bowman *v.* Cecil Bank, 8 Grant, 33.
[2] Wray *v.* Tuskegee Ins. Co., 34 Ala. 58.
[3] State *v.* Bank of Fayetteville, 8 Jones Law, 450.
[4] Lawler *v.* Burt, 7 Ohio St. 340.

value, or of ultimate payment, upon the transfer of a bank-note. Though it is probable that there is a warranty of its genuineness, as being in fact a note for the amount named on its face, issued and payable by the bank by which it purports to have been issued and to be payable.[1]

A principle, which would seem too obvious to require judicial sanction, has been declared in Massachusetts: That a bank cannot issue bills or notes upon the basis of a "special" deposit.[2] This deposit could not be used for their redemption; it cannot be availed of in business transactions to produce profit and increase the funds of the bank. The bank has not even the right to meddle with it temporarily further than is essential for its safe-keeping.

In Pennsylvania the State law required banks to keep their circulation at par, and imposed a forfeiture amounting to a certain percentage upon their circulating paper if they failed to do so. It was held by the courts that the phrase "at par" signified ordinarily equivalent to gold and silver for financial and commercial purposes. Also that the forfeiture was in the nature of a penalty, not of a tax.[3]

Issue of Circulating Notes by Banks of States.

In divers States banks have been established, which were, properly speaking, State institutions, and not corporations of the ordinary sort established by individuals from their private funds and conducted by them for their private benefit. The various institutions of this description do not of course repeat each other in all matters of detail, but those of them at least which have come into the courts resemble each other in their main features, and consequently in the legal character impressed by those features. Formally a corporation is created.

[1] Edmunds v. Digges, 1 Gratt. 359.
[2] Foster v. Essex Bank, 17 Mass. 479.
[3] Harrisburg Bank v. Commonwealth, 26 Penn. St. 451.

It has its corporate name and seal, its president, directors, and other customary officers of a bank. But the election of the officers is reserved to the legislature. The capital is supplied from the public treasury or from the pledge of public revenues, and the State is the sole stockholder. Further, the State sometimes directly guarantees the ultimate redemption of the circulation. For these banks have been uniformly banks of issue; in fact the plausible purpose of their creation has usually been the furnishing of a stable and reliable currency for the people of the commonwealth. The assumption of this function it is which has caused the constitutionality of the banks and the legality of their notes or bills to be questioned, on the ground that the issuing of these notes or bills was in truth and in substance the emission of bills of credit by the State, in contravention of the provision of the National Constitution. Twice the Supreme Court of the United States has had occasion to hear and determine causes involving this point, and each time after thorough arguments the decision has been in favor of the constitutionality of the bank and the validity of its bills or notes.[1]

The reasoning in the opinions which embody these rulings must be regarded as perfectly satisfactory. The definition of the term "bills of credit" has, not unnaturally, given considerable difficulty to the judges. Perhaps the best is to be found in the cause cited from 11 Peters, which is as follows: "A paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money." To whatever other criticism this may be open, it certainly must be deemed broad enough. Even if it be conceivable that an instrument could fall within this description and not be a bill of credit, it must at least be admitted that an instrument which does not fall within this description cannot be a "bill of credit," in the sense

[1] Briscoe v. Bank of the Commonwealth of Kentucky, 11 Pet. 257; Darrington v. Bank of the State of Alabama, 13 How. (U. S.) 12; Owen v. Branch Bank at Mobile, 3 Ala. 258.

of the prohibition of the United States Constitution. It does not require much thought to see that the bills or notes issued by the bank of a State do not display these characteristics. They are not issued by the sovereign power, not even by an agent, at least in a legal sense, of the sovereign power. They are issued by an independent corporation, having every essential and customary attribute of a complete and perfect corporate banking company. They are not issued upon the credit or faith of the State. They do not on their face bear any promise or pledge by or even on behalf of the State for their redemption. The directors of the bank have no authority to offer such a pledge. On the contrary they put forth instruments whose promise purports to be and is based upon the corporate responsibility solely. The corporation may be sued on the bills. It has assets and a capital. It is upon the faith or credit of these primarily and immediately that the circulating notes are issued, or must be conclusively presumed to be issued. The contingent and remote undertaking of the State finally to redeem them if the bank is unable to do so, does not in the view of the law constitute the credit upon which they are issued or circulate. A case which came into the Supreme Court from the State of Missouri is useful in this connection, as demonstrating by contrast the accuracy of these positions.[1] In that case promises to pay were issued under legislative authority; they were signed and countersigned, and offered to the public by State officials; they were to be redeemed in a designated manner also by State officials out of public moneys; they ranged in denomination from fifty cents to ten dollars each. It could not be questioned that these were properly "bills of credit." When the genuine bill thus appears in its proper shape, it appears as a very different article indeed from the bank-notes of the Bank of the State of Alabama or of the Bank of the Commonwealth of Kentucky.

[1] Craig *v.* State of Missouri, 4 Pet. 410.

This brief disposition of the topic suffices only to state what must be deemed a doctrine established beyond possible question hereafter, and as such would not justify a longer discussion here; but the cited cases, especially that in 11 Peters, are very exhaustive, and deserve thorough examination if the complete history of the discussion is sought for.

CHAPTER IX.

SHAREHOLDERS.

Liability of Subscribers for the Full Amount of their Subscriptions.

THE obligation of payment upon a subscription for shares in the capital stock of a banking corporation is created and perfected by the act itself of subscription. In the absence of a proviso to the contrary, the whole amount is payable immediately upon demand. But it may be stated that it shall be demanded only in instalments of specified amounts, respectively, to be called for not before certain periods; and the statement will enter into and become a valid part of the contract of subscription, except in cases where it conflicts with the charter or the organic law under which the corporation exists. But no statement, however explicit, in the original contract of subscription can relieve the subscriber from the ultimate necessity of paying the full par value of the full number of shares he subscribes for, so long as any creditors of the corporation remain unpaid.[1]

The shifts to which shareholders, who have only paid a percentage of the par value of their shares, have resorted, in order to avoid further payments after the corporation has proved unsuccessful, are very numerous. But they have uniformly met with well-deserved failure, at least so long as *bona fide* debts of the bank were outstanding. Among the most common of these subterfuges has been an agreement or understanding entered into at the time of subscription between the subscriber and the directors to the effect that only a partial payment, or sometimes

[1] Palmer *v.* Lawrence, 8 Sandf. 161; Lewis *v.* Robertson, 13 Sm. & Mar. 558.

even no real payment at all, shall be demanded. Notes of the nominal subscriber are then given, upon which it is agreed that no collection shall ever be demanded. The shares are or are not actually transferred, as the case may be; but whether transferred or not they are always regarded as the property of the bank; while at the same time the direction is able to assume that all the stock has been taken and paid for. Want of consideration, it has been held, cannot be set up in these cases.[1] An irregularity in the organization of the corporation, whether intentional and fraudulent or merely accidental, has also often been urged as a ground for invalidating stock-subscriptions, at least so far as they have not been already paid up.[2] But this plea cannot be sustained to the injury either of corporate creditors or of subsequent *bona fide* purchasers or holders of the stock, who have taken it without participation in or knowledge of any illegality or fraud. Where there has been fraud, the maxim, *in pari delicto potior est conditio possidentis*, has been relied upon as a ground why the corporation could not recover. It might avail if the question lay only between the bank and the subscriber; but the corporation in such cases is not regarded as the real or exclusive party in interest. It is rather a trustee for the creditors; and they, who are therefore the real parties, are certainly not *in pari delicto*.

Neither does it relieve any one subscriber that the subscription of another is invalid. It does not on this account follow that his own subscription is invalid. Each one may be individually sued; and if he would defend, he must set up some matter going to his own individual case, and constituting a part of his own especial dealing or contract with the corporation.[3] That the corporation has been dissolved by the expiration

[1] Agricultural Bank *v.* Burr, 23 Me. 256; Litchfield Bank *v.* Church, 29 Conn. 187.

[2] Palmer *v.* Lawrence, 3 Sandf. 161; Pine River Bank *v.* Hodsdon, 46 N. H. 114, and cases cited; Cowles *v.* Gridley, 24 Barb. 301; Johnston *v.* Southwestern R.R. Bank, 3 Strobh. Eq. 263; Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46; McDougald *v.* Lane, 18 Geo. 444.

[3] Sagory *v.* Dubois, 3 Sandf. Ch. 466; Litchfield Bank *v.* Church, 29 Conn. 187.

of its charter, or by the judicial forfeiture thereof, or that it has ceased to act as such; or that it has stopped business, or has even gone into insolvency, are none of them facts which suffice to remove the liability. The receiver or the trustee, or whoever else may have charge of the corporate affairs for the purpose of winding them up and settling with the creditors, succeeds to all the rights of the corporation in this respect. It is not only within his power, but it is a part of his legal duty, to enforce collections of unpaid stock-subscriptions, so far as may be needful to discharge the corporate indebtedness. It makes no difference that all prior calls and instalments have been duly paid. Neither does a provision for the forfeiture of stock in case of a default in the payment of an instalment have any bearing upon this rule. It cannot supersede the obligation to pay in full; but is to be construed as cumulative.[1]

The doctrine that the stock subscriptions are in the nature of a trust fund for payment of corporate liabilities seems to be well established. From it results the principle that subscribers cannot avail themselves of the Statute of Limitations in bar of the claims of creditors to have full payment made. For the subscribers are chargeable with the trust, and though the corporation may never have seen fit to enforce it, yet the *cestuis* do not thereby lose their rights.[2] The collection in due season by the corporation is a matter lying wholly between itself and the subscribers. The neglect of the former cannot exonerate the latter from obligations which do not run alone to the corporate body for its sole benefit, but rather continue through it, as through a conduit pipe, for the real and ultimate benefit of creditors. The corporation cannot stand between the real debtors and the real creditors, and by its *laches*, continued for six years, which under such circumstances would often be vol-

[1] Sagory *v.* Dubois, 3 Sandf. Ch. 466; Lewis *v.* Robertson, 13 Sm. & Mar. 558; Bank of St. Mary's *v.* St. John, 25 Ala. N. S. 566; Thornton *v.* Lane, 11 Geo. 459.

[2] Payne *v.* Bullard, 23 Miss. 88; King *v.* Elliott, 5 Sm. & Mar. 447; Arthur *v.* Commercial & R.R. Bank of Vicksburg, 9 id. 430. Also see cases cited *supra*, reference 8, which also assert the doctrine of a trust as laid down in the text.

untary and culpable, save the former from a *bona fide* liability to the latter. The eited case of Payne *v.* Bullard, however, allows the possibility of one very reasonable exception to this rule in the case where the bank ceases to elect officers and to carry on business. A contemporaneous cessation of the trust may be fairly considered as taking place, from the date of which the statute may properly begin to run. Whether the corporation itself by neglecting for six years to call for any instalment would thereby forfeit its rights to demand further payments for any other purpose than that of meeting corporate debts which the corporate assets do not suffice to pay, is a question which has never been decided. Probably the bank would not be regarded as having released its original subscribers simply because it had refrained from mulcting them for a few years. But the lapse of several years creates a natural presumption that the subscriptions have been paid in,[1] and therefore one who held through mesne conveyances from an original subscriber, and had had no personal knowledge of the fact that full payments had not been made, might have a reasonable and a sufficient claim to protection.

To the same doctrine of trust must be referred the further principle that a subscription for bank stock cannot be diminished after it is once made. So soon as it is legally complete it is an obligation from which even the directors cannot grant the subscriber any absolution, either for the whole or for any part, which will avail him as against persons who were creditors of the corporation prior to the diminution. The directors do not represent these persons, and are unauthorized to discharge an indebtedness of which they are the real beneficiaries. Though as towards subsequent creditors the proceeding may doubtless be perfectly valid, if not tainted in any respect with ill-faith.[2]

After shares have been issued the owner of course has the

[1] Agricultural Bank *v.* Burr, 23 Me. 256.
[2] Payne *v.* Bullard, *supra.*

ordinary power to sell and transfer them; equally whether the whole price or only an instalment has been paid up, unless the by-laws declare otherwise. But before this stage has been reached, while his position is simply that of a subscriber, his privilege of transfer exists indeed, but is subject to the restriction that it will not be valid so far as to relieve him from his liability upon the unpaid balance of his subscription, unless it is assented to by the corporation, and his assignee is accepted, either directly or by sufficient implication, in his place. After such acceptance the assignor is fully relieved and exonerated from all liability on his subscription, and the assignee, by virtue of the same act, succeeds in every respect to all the liabilities, rights, privileges, and disabilities of his assignor, as herein above set forth.[1] After an issue of shares the shareholder is an owner of assignable personal property; before the issue he is only a party to a contract in which his interest can be divested only with the consent of the second contractor.

It has been held in New York that signature of the articles of association and writing a certain number of shares opposite the signer's name have the legal effect of, and are valid as a subscription for, that number of shares: and this, although the document does not in terms profess to be, or to create, a contract of subscription.[2] The articles provided for in sect. 5 of the Act of 1864 are similar in their nature, and the cited cases form proper precedents for the determination of like questions arising in regard to them. That the organization certificate provided for in sect. 6 is, if not strictly a subscription in itself, at least such proof of subscription as would estop any signer from denying the fact, does not admit of a doubt.

[1] Cowles *v.* Cromwell, 25 Barb. 413; Palmer *v.* Lawrence, 3 Sandf. 161; Cole *v.* Ryan, 52 Barb. 168.

[2] Cole *v.* Ryan, *supra*; Dayton *v.* Borst, 7 Bosw. 115.

Liability of Shareholders in Excess of their Shares of Capital Stock.

Liability of this description is the creature solely of legislation. It can arise only under the charter or under the organic law of the corporate existence. The general liability of all combined may be restricted to the single duty of paying off and redeeming all the paper of the bank which is circulating as currency at the time of the winding up of its affairs; or it may be extended to embrace the entire corporate indebtedness of every description. The extent of the possible liability of each individual may be unlimited save by the amount of his proportion of the aggregate indebtedness of all; or it may be specially restricted by the proviso that it shall not exceed a certain absolute amount, as for example the amount of the par value of all the shares held by him. This last proviso is of frequent occurrence in banking statutes. It is often loosely expressed; but it seems that the obvious intention of the legislators will be allowed to correct the inaccuracy of their phraseology. Thus where, by the language of the act, the measure of a stockholder's liability was stated to be "the amount of his stock," a literal interpretation would have permitted only a forfeiture of his shares. But since this must take place at any rate, and the law thus construed would be foolish and superfluous, it was held that the words should be treated as if they had read, as it was doubtless intended that they should read, "A sum equal to the amount of his stock."[1] The amount of his stock will be determined by estimating his shares at their par value without regard to the market price.[2]

A provision that the liability shall attach only when the debts exceed twice the amount of the capital stock, has been construed to signify not the nominal capital stock, but only the amount which has been actually paid in. If the debts

[1] *In re* Empire City Bank, 18 N. Y. 199.
[2] Thornton *v.* Lane, 11 Geo. 459; Lane *v.* Morris, 10 id. 162.

are more than double this amount then the stockholders will be held.[1]

After a bank has been organized either under a charter or under a general banking law the legislature will have no power to create by subsequent enactment any personal liability on the part of the stockholders in excess of the loss of the money paid in by them for their shares. The effort in fact aims at impairing the obligation of a contract, and as such would, of course, be fruitless. But if the charter or the organic law contained a clause declaring them subject to future alteration or amendment, then the obstacle to the subsequent creation of personal liability is removed. In that case a general law, passed for the purpose of affecting banking corporations generally, will affect all such as have been organized under a charter or a law containing this reservation. Neither will it make any difference that the articles of association distinctly assert that there shall be no personal liability; for these are valid only as they are in perfect subjection to and in accordance with all the results, direct and indirect, arising out of the law of the corporate existence.[2] Where "the original stockholders, their successors and assigns," are declared liable, the literal interpretation will be so far modified as to hold only those persons who are holders at the time when the default takes place, and the liability accrues.[3]

Who is Liable as a Shareholder.

As a general rule any person whose name is registered on the stock-ledger of the corporation as a shareholder will be held liable as such. The records in this book are *prima facie* evidence of ownership.[4] If persons have suffered their names to be entered as stockholders, though by virtue of some arrange-

[1] Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46.

[2] *In re* Empire City Bank, 18 N. Y. 199; *In re* Oliver Lee & Co.'s Bank, 21 id. 9.

[3] Bond *v.* Appleton, 8 Mass. 472.

[4] Thornton *v.* Lane, 11 Geo. 459.

ment with the bank by which it is agreed that they shall only assume this appearance without making any payments or becoming stockholders in fact, still they will be held to all the liabilities of ordinary and regular owners for the benefit of creditors.[1] Even where directors, for the purpose of sustaining the credit of the bank and without any ulterior motive beyond the corporate welfare, allow shares to be placed in their names simply as a cover and because they believe that the same could not be properly purchased or owned by the bank, they will be treated as owners so far as liability is concerned. When shares have been hypothecated and placed in the transferee's name on the books, it has been said that probably both the transferror and the transferee could be held to contribute; but that certainly the transferee could, simply because the property appears in his name.[2] But where shares have been placed in the name of a person without his consent, express or implied, and without consideration passing from him, he will be liable as a stockholder only in cases where it is shown affirmatively that he has acted fraudulently in the matter, or with the purpose of injuring the creditors of the bank.[3]

Executors, who have invested funds of the estate in bank-shares, without leave under the will or by law to do so, do not thereby make the estate liable to contribution as a shareholder.[4]

Necessary Preliminaries to Suits against Shareholders.

Whether any, and if so what, proceedings are necessary, as preliminary to the suit by the creditor against the stockholder, is a matter concerning which the authorities are not wholly uniform. The better principle seems to be that recourse should first be had to the corporation, and that some evidence of the incapacity of the corporation to meet the demand should

[1] *In re* Reciprocity Bank, 22 N. Y. 9.
[2] *In re* Empire City Bank, 18 N. Y. 199.
[3] Robinson *v.* Lane, 19 Geo. 337.
[4] Diven *v.* Lee, 36 N. Y. 302.

be furnished before the right of action against the individuals will accrue.[1] Such recourse would naturally take the form of a suit at law against the bank; and such evidence could scarcely take a better form than a return of *nulla bona* made by the sheriff upon an execution issued against the corporate property. Though, of course, any evidence which simply *tends* to show a total want of assets on the part of the bank must be open to rebuttal by positive proof of the existence of such assets.[2] In ordinary cases so long as there are assets which have not been divided among the creditors, the shareholders cannot be looked to. A dividend consuming the whole property ought first to be declared, and it will be no excuse for a suit brought before its declaration, that it has been postponed indefinitely for the purpose of preventing a sacrifice of the property. It is to be inferred from the cited cases that such postponement is improper. The creditors are entitled to immediate payment and cannot be held to wait, perhaps for years, until the parties having charge of the assets have brought them into a condition to be advantageously turned into money. The difficulty of disposing of them at once, in order to excuse the failure to do so, must be something verging upon temporary impossibility. But in that case the right of the creditor to immediate payment will be regarded as paramount to the right of the stockholder to have the assets first exhausted. The court may then order an apportionment of the corporate debts among the shareholders. For it is just that, if any such inevitable delay is to be encountered in winding up the affairs, the hardships induced by it should be borne rather by the parties who owe than by those to whom the debt runs.[3]

But even in cases where a judgment has been actually recovered against the bank, it does not absolutely conclude a stockholder. If an effort is made to levy the execution issued

[1] Grew *v.* Breed, 10 Met. 569; Cochituate Bank *v.* Colt, 1 Gray, 382.

[2] Payne *v.* Bullard, 23 Miss. 88; Hewett *v.* Adams, 50 Me. 271; 54 id. 206; Thornton *v.* Lane, 11 Geo. 459; Harris *v.* Lane, 16 id. 217.

[3] *In re* Reciprocity Bank, 22 N. Y. 9; *In re* Reciprocity Bank, 29 Barb. 369.

under such judgment upon his property, he will be allowed to bring his writ of error to obtain a reversal. For though he was not strictly and technically a party to the suit, and would not even have been allowed to appear and defend it, though his private property had been attached in it,[1] yet his interest in its result and his personal liability thereby entailed make him privy to it; and justice requires that since the proceedings did not profess to conclude him personally, and did not directly summon him as a defendant to attend to and contest it, he should have the opportunity afterwards to be heard before his property is taken from him.[2]

But upon the other hand it has been held in Georgia, where this whole matter has been the subject of much litigation, that where the statute makes both directors and shareholders liable, the liability will, in the absence of distinct language to the contrary, be joint and not several; and the liability of the shareholders will be primary and original and not secondary and collateral, to that of the directors; and will not require that of the directors to be first resorted to.[3] Again, in Alabama, it was held that the holders of the circulating notes or bills of a foreign banking corporation, which had become insolvent, might bring their bill in equity, charging fraud and seeking a discovery and an accounting, making the directors, stockholders, and agents of the company respondents, without first obtaining a judgment at law.[4] This case however is somewhat beside the precise question; and the Georgia cases can hardly be allowed to overrule those cited to sustain the doctrine of the preceding paragraph, which is also fortunate in having the support of sound reason in addition to judicial authority. Only one remark, in the cited case of Lane *v.* Morris, is worthy of note. It is to the effect that the liability

[1] Whitman *v.* Cox, 26 Maine, 335; Merrill *v.* Shaw, 38 Maine, 267.

[2] Rankin *v.* Sherwood, 33 Maine, 509.

[3] McDougald *v.* Lane, 18 Geo. 444; Robinson *v.* Bealle, 20 id. 275; Lane *v.* Morris, 8 id. 468.

[4] Bank of St. Mary's *v.* St. John, 25 Ala. 566.

of the stockholders cannot be enforced by the receiver or assignee of the corporation, since it constitutes no part of the assets of the bank. The rule seems to be sound, and it must be regarded as clear that the suit should be brought directly by the creditor against the stockholder. But though this draws after it the corollary that the right of action against the shareholder is independent of that against the bank, it is far from implying that the two suits may be prosecuted contemporaneously, or that the one against the shareholder may precede the other.

Interest.

In Georgia it has been held that where the stockholder is sued by the holder of circulating bills of the bank, interest upon the amount of the bills can be recovered only from the date at which demand of payment was made upon the defendant individually, and not from the time of demand upon the bank.[1] But in Massachusetts it has been held that a stockholder is not liable to pay any interest at all on bank-bills.[2]

Defences in Suits against Shareholders.

It is not sufficient for the plaintiff to allege in his suit against the shareholder that he is under a liability to pay. An actual consideration must have passed from the plaintiff. Thus, if his suit be upon the bills of the bank, he must be the holder of them for value; and this not only to bring him within the above rule, but also because unless he holds, and is therefore in a position to surrender, the bills, and so to prevent future suits and recoveries upon these identical ones, he cannot be allowed to have judgment against the stockholder. For the stockholder is entitled to this protection no less than the bank itself, in whose place, so far as the redemption of the bills in question goes, he will stand by virtue of his payment

[1] Lane *v.* Morris, 10 Geo. 162.
[2] Crease *v.* Babcock, 10 Met. 525; Grew *v.* Breed, id. 569.

of them.[1] The obligation of the bank is only to redeem upon presentation and surrender, or proof of actual destruction of specific and described bills, and his obligation cannot be extended in excess of that of the bank, whose default alone he is to make good.

Where one is a creditor as well as a stockholder, he cannot avail himself of the debt owing to him by the bank by way of set-off to diminish his contributory share.[2] His liability as a contributor for the benefit of creditors must be distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions. In the latter case, we have seen that he enjoys the right of set-off even when his claim is based only upon the circulating paper of the corporation.

If the stockholder can show that as a matter of fact the directors in creating or permitting the indebtedness, for the discharge of which a contribution is sought, exceeded their proper authority, and that the creditor then knew or ought to have known that their action was thus beyond their powers, he will establish a good and sufficient defence as towards this creditor.[3] For though the shareholders make the directors their general agents, still the functions of those agents are matter of custom and of common knowledge. If they stretch their powers to the execution of acts beyond the scope which ordinary custom has marked out as appurtenant to their office, they will bind their principals only, provided that they have been invested with a real extraordinary authority or have been clothed with such a semblance of it that the injured party was naturally deceived, without ignorance or other species of default upon his own part. But for their wrongful acts within the scope of their powers, as by the over-issue of bills for circulation, the shareholder will be liable to any innocent creditor,

[1] Pollard *v.* Stockholders of Kentucky Exporting Co., 4 J. J. Marsh. 52.

[2] Garrison *v.* Howe, 17 N. Y. 458; *In re* Empire City Bank, 18 id. 199.

[3] Leavitt *v.* Yates, 4 Edw. Ch. 184.

who became such by virtue of the wrongful act, but without knowledge of it.[1]

If the plaintiff is shown to have been an officer of the bank, and to have been guilty of malversation in office, he will be able to make out no case for contribution against a shareholder who proves these facts.[2] In like manner one who, though not an officer, has yet taken part in the illegal organization of the corporation, will not be allowed to sustain a suit against a shareholder, even though his debt is of so favored a nature as the circulating bills of the bank.[3]

When the liability of the shareholders is confined to the redemption of the circulating paper, they cannot be held to contribute for the redemption of bills in the hands of one who took them from the bank simply as security, and upon the especial agreement that they should be held by him as such, and should not be put in circulation.[4]

Nature and Extent of the Remedy against Shareholders.

General principles would lead, without doubt, to the conclusion that the creditors ought properly to seek their remedy in equity; unless the phraseology of some especial statute should authorize a divergence from these principles. Clearly the creditors ought to share equally the funds which must be contributed by the shareholders. But if any single creditor can sue any single shareholder, great inequality will be necessarily produced, an immense number of suits will be instituted, the temptation will be great for fraudulent arrangements between individual creditors and those among the shareholders who are more easily come at to be sued, and who are more likely to be solvent when the judgment is obtained. Multitudes of the smaller creditors, and probably those who are least able either to lose the money or to take the necessary means for

[1] McDougald v. Bellamy, 18 Geo. 411; Grew v. Breed, 10 Metc. (Mass.) 569.
[2] McDougald v. Bellamy, 18 Geo. 411. [3] Robinson v. Lane, 19 Geo. 337.
[4] Johnston v. Southwestern R.R. Bank, 3 Strobh. Eq. 263.

recovering, and who therefore most need the protection of precisely such legislation, would be practically ousted of the relief which the statute would pretend to provide. But proceedings in equity would render the remedy thorough and equal, and in every respect what it ought to be and what it assumes to be. The bill, as is customary in proceedings of a similar character, should be brought either by all the creditors, or by one or more creditors for the benefit also of all such as should afterwards seek to come in and bear their proportion of the expenses. This method has been adopted in Massachusetts, Maine, and Wisconsin.[1] It has also been approved as a proper method in New York.[2] Though in this last State it has been held that a suit at law will lie in favor of a single creditor against a single shareholder.[3] The same seems also to be the rule in Rhode Island,[4] Indiana,[5] and Georgia.[6] Though in the first two named the language of the statute, rather than any rule of law or principle of justice, appears to be at the bottom of the decisions; and in Rhode Island the court particularly remarked that the subject was eminently proper for equity jurisdiction. The Indiana case further holds that, though the shareholders are liable "individually," still it is perfectly proper to join any number of them in one and the same suit as co-defendants. It would seem as though equity must always be able to exercise jurisdiction; but further than this the equitable jurisdiction ought to be exclusive.

The liability of each stockholder is precisely for his ratable proportion of the sum total of that indebtedness of the bank which is to be borne by the shareholders, whether this be its entire indebtedness of every description or only its indebted-

[1] Harris v. Dorchester, 23 Pick. 112; Crease v. Babcock, 10 Met. 525; Grew v. Breed, id. 569; Coleman v. White, 14 Wis. 700; Wiswell v. Starr, 48 Me. 401.

[2] Slee v. Bloom, 19 Johns. 456; Briggs v. Penniman, 8 Cow. 387.

[3] *In re* Hollister Bank, 27 N. Y. 393; Bank of Poughkeepsie v. Ibbotson, 24 Wend. 473.

[4] Atwood v. Rhode Island Agricultural Bank, 1 R. I. 376.

[5] Wright v. Field, 7 Ind. 376.

[6] Harris v. Lane, 16 Geo. 217.

ness upon its circulating bills and notes. After he has once paid this proportional amount to any person or persons having a legal right to demand it from him, he is fully acquitted and discharged. His liability is for his share of the total indebtedness, not for his proportion of each item of that indebtedness. Neither are the solvent shareholders, or those who can be come at for collection, liable to assessment beyond the proportional amount above described, by reason of the insolvency or inaccessibility of others of the shareholders. Those who are solvent and accessible have not the burden of paying off the whole sum which is due from all together, but only their own proportionate shares. It is the same if the bank owns shares of its own capital stock. In assessing the other shareholders, the calculation will be made upon a basis including these shares precisely as if they were held by any outside party.[1] Making an equation according to the time-honored rule of three, the liability of each individual may be thus ascertained: As the *whole capital stock* is to the *entire indebtedness* which the shareholders are liable to discharge, so is the *par value of all the individual shareholder's shares* to *his proportion of the amount to be redeemed.* The last figure, "his proportion of the amount to be redeemed," is the sum which he is liable to pay.

Where the proceedings are by bill in equity, it is obvious that actual personal notice often cannot be given to all the shareholders. Their names and addresses may not always be correctly discoverable from the stock-ledger. Even when the names of foreign shareholders are known, still the court may not be able to acquire such jurisdiction over them as will suffice to enforce their obligation to contribute. But by reason of the natural notoriety of such a matter among those who are so nearly interested, and by reason also of the utter impossibility of otherwise securing the ends of justice, it has been held that

[1] *In re* Hollister Bank, 27 N. Y. 393; Hollister *v.* Hollister Bank, 2 Keyes, 245; Harris *v.* Lane, 16 Geo. 217; Robinson *v.* Bank of Darien, 18 id. 65; Robinson *v.* Lane, 19 id. 337; Wiswell *v.* Starr, 48 Me. 401; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

notice to foreign holders may be sufficiently made by publication in the public newspapers.[1]

Each respondent will be allowed to file his separate answer, and to contend the case independently of the rest.[2]

Who can Sue Shareholders.

In whose favor the right of action against the shareholders exists depends upon the nature of the collection which is to be enforced. If the demand is for further instalments upon subscriptions for shares of the capital stock the receiver or trustee, or other legal representative of the corporation, who has succeeded to its rights, has the exclusive power to sue. For the sums thus owing are simply debts to the corporation constituting a portion of its assets which its representative and successor not only has the right, but is under the obligation, to collect for the purpose of discharging the indebtedness. But if the demand is for further contribution, beyond the amount of the par value of the shares already paid or due under the original subscriptions, then it would seem, that, unless the statute expressly makes the sums thus contributed assets of the corporation, and directly gives the right of collection to the receiver or trustee, the suit should properly be brought by the creditors whose claims are to be paid out of the proceeds. It is their sole and peculiar right which they are at liberty to enforce when they please, or altogether to forego. There seems to be no ground upon which any other person could sustain suits of this description, and the practice seems to have been almost uniformly for stockholders alone to undertake to bring them.[3] In Maine, however, the rule is different. There

[1] *In re* Empire City Bank, 18 N. Y. 199. See also Diven *v.* Lee, 36 N. Y. 302.

[2] Wiswell *v.* Starr, 48 Me. 401.

[3] See Lane *v.* Morris, 8 Geo. 468; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376. In this case it is true that the receiver had stated in an answer filed in court that he did not deem it to be his duty to levy contributions upon the shareholders. But apparently the court was of the same opinion; at any rate it expressed no disapprobation of his views and simply sustained the direct and immediate right of action by the stockholders without comment.

a receiver is allowed to sustain a bill in equity against all the shareholders to enforce contribution. If he is himself a shareholder or has been one at any previous time so that he is himself liable to contribute, his bill will not lie since he must be both a complainant and a respondent.[1]

Lien upon Shares for Holder's Indebtedness to Bank.

No lien exists at common law upon the shares of a shareholder who is indebted to the bank. But it is often sought to be established either by legislative enactment, by charter provisions, or by embodiment in the articles of association or in the by-laws. It may also exist by virtue of a usage of the particular bank; but it will be valid then only as against shareholders who have notice of it, and their assignees who also have notice or else who take without valuable consideration.[2] Any of these methods are sufficient with the exception of the attempt to establish it by by-laws. Concerning this it has been held that the subject is not one which it is competent for the corporation to control by a by-law. Its importance requires more formal treatment. The associates have the power to include it in their articles of association, but it is not to be assumed that what they can thus dispose of they can by the same articles determine to dispose of in by-laws or through the action of the directorial board. The same rule, which was first laid down concerning corporations established under the New York State law, has since been extended to corporations organized under the National Banking Act of 1864.[3] An attempt to make a transfer in derogation of a valid lien of this nature is of no effect as against the bank. The lien is not impaired and the transfer can be good only as between the

1 Wiswell *v.* Starr, 48 Me. 401; Hewett *v.* Adams, 50 id. 271.

2 Morgan *v.* Bank of North America, 8 Serg. & R. 73.

3 Bank of Attica *v.* Manufacturers' & Traders' Bank, 20 N. Y. 501; Leggett *v.* Bank of Sing Sing, 24 id. 283; Arnold *v.* Suffolk Bank, 27 Barb. 424; Rosenback *v.* Salt Springs National Bank, 53 id. 495; Conklin *v.* Second National Bank, id. 512.

parties, until such time as the indebtedness is discharged. In the mean time the strict, and doubtless the correct, rule would permit, and might oblige, the bank to recognize only the transferror as the holder of the shares.[1] For he has had no right as towards the bank to divest himself of the ownership, and it might be dangerous for the bank itself if it should lay itself open to the charge of having ratified the transfer and waived its lien by recognizing the transferee as the owner. If it should so recognize him for any especial purpose, care should at least be taken expressly to reserve the lien.

It is a general, perhaps it may be considered an universal, rule with banks which claim the right to enforce a lien of this nature, that no transfer of shares can be made which shall be valid as towards the corporation itself save upon the corporate books. Such rules, duly established by legislative or directorial action, will be sustained by the courts, and no transfer of any other description which the parties may make between themselves will bind the bank. The assignee in any such contract will take only an equitable right to the shares, encumbered with all the liens which had become fastened upon them in the hands of the assignor. This is the case equally whether the assignee had or had not notice, at the time of the transaction, of the rights or the claims of the bank.[2]

But it has been declared that the bank is bound to give effect to an equitable assignment, of which it has notice, to this extent: that it can no longer regard the shares as security for any subsequently created indebtedness of the assignor. They are available only upon his debts which have already arisen. But for debts of the assignee the bank may thereafter enforce a lien which will be perfectly valid, though the transfer has not been made, and which will only be secondary to the lien for

[1] Bank of Utica v. Smalley, 2 Cow. 770.

[2] Union Bank v. Laird, 2 Wheat. 390; Farmers' Bank v. Iglehart, 6 Gill, 50; Brent v. Bank of Washington, 10 Pet. 616; Reese v. Bank of Commerce, 14 Md. 271; Klopp v. Lebanon Bank, 46 Penn. St. 88.

the assignor's debts.[1] But it must be confessed that this rule, which has only been enunciated in one western court, does not seem wholly satisfactory. Another ruling, which though somewhat similar, yet avoids the unsatisfactory element in the preceding case, and is certainly not open to criticism, asserts that if the bank has notice that the shares are held only in trust by the nominal owner, it can thereafter hold them to secure the indebtedness of the *cestui*, and of him alone.[2]

Waiver and Loss of Lien.

If the bank suffers the transfer to be made upon its books, without the express stipulation that the shares shall still be held by the assignee subject to the lien for the then subsisting indebtedness of the assignor, it will amount to a waiver of the lien.[3] But where the act is less direct and unquestionable the presumption must always be that no waiver was intended. The president and directors may be admitted to testify that they never designed to waive. Where the certificate of shares states that they are transferable at the bank, or only at the bank, — both expressions being of the same force,[4] — personally or by attorney, on the surrender of the certificate, there is nothing in this language which intimates a waiver or abandonment of lien, or of the right to refuse a transfer so long as the person to whom this certificate was issued remains indebted to the bank.[5] If there is any indorser or guarantor for the shareholder's indebtedness the bank may at any time demand and receive further security from him without in any way infringing or affecting its right of lien.[6] A statutory prohibition, for-

[1] Conant *v.* Seneca County Bank, 1 Ohio St. 298.

[2] Mechanics' Bank of Alexandria *v.* Seton, 1 Pet. 299.

[3] Sewall *v.* Lancaster Bank, 17 Serg. & R. 285; Rogers *v.* Huntingdon Bank, 12 id.

[4] Williams *v.* Mechanics' Bank, 5 Blatchf. C. C. 59.

[5] Union Bank *v.* Laird, 2 Wheat. 390; Hill *v.* Pine River Bank, 45 N. H. 300; Reese *v.* Bank of Commerce, 14 Md. 271.

[6] Union Bank *v.* Laird, *supra.*

bidding the bank to loan on the security of its own stock, only forbids it to take such shares directly in pledge, and is not intended to affect the general statutory lien, or loans which may be made in reliance thereon.[1]

The lien is appurtenant to the indebtedness and not to the remedy. Whence it follows that though the right of action at law may have been barred and the remedy lost by the running of the Statute of Limitations; still, the indebtedness not being thereby discharged, the lien subsists. The two are coexistent.[2]

For what Indebtedness the Lien attaches.

The nature of the indebtedness, whence or how arising, is a matter of no consequence as regards the attaching of the lien.[3] But whether the lien will only attach to secure indebtedness which has actually matured at the time when a demand for transfer is made, is a question concerning which the courts are not all agreed, though a decided preponderance is observable. In Maryland it has been decided in the negative.[4] But the current of authority seems to tend decidedly the other way.[5] Certainly it seems reasonable that the lien should secure indebtedness which has not fully matured; otherwise a large portion of the good which is sought to be accomplished by it must be wholly annulled. The bank, knowing itself to be entitled to such a lien, may fairly be supposed to rely upon it in allowing the indebtedness to be assumed originally, and would be justified in regarding it as a valuable contribution towards perfect security, on the faith of which the directors may not improperly neglect to demand such strong additional safeguards as

[1] Vansands *v.* Middlesex County Bank, 26 Conn. 144.

[2] Farmers' Bank *v.* Iglehart, 6 Gill, 50.

[3] Rogers *v.* Huntington Bank, 12 Serg. & R. 77; Mechanics' Bank *v.* Earp, 4 Rawle, 384.

[4] Reese *v.* Bank of Commerce, 14 Md. 271.

[5] Leggett *v.* Bank of Sing Sing, 24 N. Y. 283; Grant *v.* Mechanics' Bank of Philadelphia, 15 Serg. & R. 140; Sewall *v.* Lancaster Bank, 17 id. 285.

they are wont. Further, if the lien does not apply to immature indebtedness, what is to prevent the grossest frauds by the debtor. He cannot be legally opposed, if, with the express purpose of stripping the bank of all possible means of repaying itself and knowing that he will not and can not himself pay it, he transfers all his shares upon the very day before his note to the bank is to fall due. Such rulings as that of the Maryland bench obviously operate only to impugn the wisdom of granting any such lien at all by robbing it of nearly all its value.

The lien is primarily for the benefit of the bank. But if the principal debtor furnishes sureties or guarantors upon the debt, and they pay the amount to the bank, they will then be subrogated to all the rights of the bank. They will be entitled to avail themselves of the lien, and the bank will owe to them the duty of refusing to allow a transfer of the shares or the suffering a waiver or loss of the security by any other means, until they have been reimbursed. After their payment the bank in fact becomes a trustee for them for the purpose of doing whatever may be necessary to retain and secure the lien for their benefit.[1] The rule that the surety is entitled to the benefit of all the creditor's securities has been carried so far in respect to liens upon bank shares, that it has been held that the bank has no right to appropriate, or shift, the lien for the purpose of covering a new demand, with the effect of leaving the debt on which the surety is liable either unsecured or imperfectly secured.[2]

The lien will attach upon bank-shares, which are the private and separate property of one of the partners in a firm, to secure a debt due from the firm.[3]

It does not prevent the lien from attaching, or the bank from refusing to permit a transfer, that the deposit account of the

[1] Klopp v. Lebanon Bank, 46 Penn. St. 88.
[2] Kuhns v. Westmoreland Bank, 2 Watts, 136.
[3] Mechanics' Bank v. Earp, 4 Rawle, 384.

debtor is greater than the amount of his indebtedness. The bank is under no obligation to look to the deposit account before or in preference to the stock. But it seems that if the shareholder offers ample security for the debt and the bank still refuses with unreasonable strictness to permit the transfer, the shareholder will then have a right of action against the bank for the refusal.[1] This is intimated in the cited case; but it was, strictly, an *obiter dictum*, and there seems to be some reason for doubting by what right the courts could compel the bank to exchange, or punish it for refusing to exchange, a security of a peculiar nature, which the law has either directly given to it or has allowed it by its own action to secure, and to take in its stead other species of security which, though it may appear equally valuable and sufficient, may yet for divers reasons be less acceptable to the directors. But if the bank assents to accept other security, the lien may be thereby discharged, unless the contrary understanding be affirmatively proved.[2] Though the value of the shares may far exceed the amount of the debt, still the debtor is not entitled to demand an apportionment. The lien affects them as a whole, and not only what may appear, or may really be, a sufficient part of them. The bank is therefore entitled to refuse any transfer whatsoever, without regard to comparative values or amounts.[3]

Shareholder's Right to Surplus Assets and New Shares.

Any surplus which may remain, after the payment of all corporate debts, in the hands of the assignee, trustee, receiver, or other person who has had the corporate property committed to his charge for the purpose of winding up its affairs, belongs to the shareholders. They are entitled to have it apportioned among them according to the number of their respective shares. The trust is first for the discharge of the indebtedness of the

[1] Mechanics' Bank *v.* Earp, 4 Rawle, 384.
[2] McLean *v.* Lafayette Bank, 3 McLean, 587.
[3] Sewall *v.* Lancaster Bank, 17 Serg. & R. 285.

bank, and next for a division of the remaining assets among the corporators. For this reason and also because of the number of persons interested, a bill in equity may properly be brought against the trustee demanding that he account and that he collect and distribute the surplus property. Though if it should happen that an apportionment has already been made and that only payment in accordance with it is sought, then each individual shareholder might maintain his own action at law for the collection of the sum due to him, like any other action for simple debt.[1] But the ownership of shares, or the payment of a contributory share under the apportionment for the payment of corporate debts, does not render the shareholder a creditor of the corporation, or entitled to any dividend out of its assets till all the proper indebtedness has been discharged in full.[2] Not even if the shareholders have been assessed upon the basis of an undervaluation of the corporate assets can they have any dividend returned to them so long as there are creditors remaining unpaid.[3]

Where there is an increase of the original amount of the capital stock of the bank and new shares are created to represent it, those who are shareholders at the time of the creation have the first right to subscribe, in the proportion of their original shares, for the new ones, before these can be offered generally.[4] But where the full amount of the original capital stock has never been subscribed for, and the full number of shares thereof have never been issued, the case is different. If the directors then see fit to accept or solicit subscriptions for the shares remaining untaken, they are not obliged to give those who are already shareholders any preference, but may offer the fresh shares in open market.[5]

[1] Bacon v. Robertson, 18 How. U. S. 480; Smith v. Snow, 3 Mad. C. C. 310.

[2] Hollister v. Hollister Bank, 2 Keyes (N. Y.), 245; Coulter v. Robertson, 24 Miss. 278.

[3] Pruyn v. Van Allen, 39 Barb. 354.

[4] Gray v. Portland Bank, 3 Mass. 364.

[5] Curry v. Scott, 54 Penn. St. 270.

Transfer and Certificates.

Every person who becomes the owner of shares is entitled to demand that the bank shall permit the necessary formalities accompanying and requisite to the completion of a transfer to be performed on its books, and that it shall issue to him a certificate for the shares, such being the ordinary usage of business in this respect.[1] An action will lie for a wrongful refusal to comply with these obligations.[2] Though if the bank has any lien upon the shares, or if the party himself or the seller of the shares fail to conform to the requisite and reasonable formalities established by the bank in the matter of transfers, the bank will be entitled to refuse to act until the obstacle is removed. Statutory provisions declaring the shares to be transferable at the bank, or that the transfer shall be registered on the books of the bank, are designed for the protection of the bank, and will be so construed as to secure that protection. The transfer will not be considered as having been made "at the bank" simply because the parties have passed and received the certificate within the walls of the banking house. The act must be so done as "to assume a formal and authentic shape, under the official cognizance of the officers of the institution." The regulations of the corporation in the premises, unless unreasonable, must be complied with.[3]

Ownership by Bank of Shares in its own Capital Stock.

Shares of the capital stock of the bank may at any time be transferred to it by the holder, for the purpose of securing or discharging his indebtedness to the bank. The bank may then properly hold and own these shares precisely as if it were an outside party. It was said, in the case cited from 10 Ohio Reports, that it was only for this purpose of securing a debt that

1 Hussey v. Manufacturers' Bank, 10 Pick. 415.
2 Morgan v. Bank of North America, 8 Serg. & R. 73.
3 Williams v. Mechanics' Bank, 5 Blatchf. C. C. 59.

a bank could legally become interested in its own stock, and that the propriety of removing the restriction even in cases of this nature was not wholly free from question.[1] But in Vermont banks have a general right to purchase shares in their own stock.[2] If the shares are transferred to the president, or other proper officer, in trust to hold for security of the debt, and to sell if the debt should not be paid, and hold any surplus proceeds of the sale after discharging the debt and expenses for the benefit of the debtor, the debtor will still be regarded as a shareholder in the corporation so long as the shares remain unsold. The arrangement will not be deemed absolutely to divest him of all title to and interest in his property until the trustee has actually parted with it under the power.[3] But if, while the shares are still in the hands of the trustee an instalment is demanded which the transferror neglects to pay, and dividends are declared, which however are only payable to shareholders who have duly paid their instalments, he will not be allowed afterward, upon paying the debt and obtaining a retransfer of the shares, to recover the dividends from the company. The bank is under no obligation from the nature of the trust to advance money to pay the instalments on behalf of the debtor. On the contrary, unless it felt bound to do so, for the purpose of ultimately saving itself from loss by preventing the security from deteriorating in value, it would, strictly speaking, have no right to use the funds of the bank in this manner. It would be a misappropriation of them.[4]

Shareholders' Right of Action against Directors.

The right to sue directors for malfeasance in office, whereby loss accrues to the shareholders, is often expressly given to the shareholders by statutory enactment; though, without doubt,

[1] State of Ohio *v.* Franklin Bank of Columbus, 10 Ohio, 91; Taylor *v.* Miami Exporting Co., 6 Hamm. 176, also, by implication, the two cases cited next below.

[2] Farmers' & Mechanics' Bank *v.* Champlain Transportation Co., 18 Vt. 131; 23 id. 180.

[3] Merchants' Bank *v.* Cook, 4 Pick. 405.

[4] Marine Bank *v.* Biays, 4 Har. & J. 338.

it exists at common law in the absence of any legislative intervention. Errors of judgment, unless so gross as to resemble fraud, or to render the acceptance of office practically a fraud by reason of entire incapacity and unfitness for it, give no right of action. But any fraudulent act, or any breach or neglect of statutory or charter provisions, whereby loss is entailed upon the corporation, and the value of the shareholders' property is as a necessary consequence depreciated, gives a right of action at law to each one of them to recover the damage or loss which he individually has sustained. The suit need not join all the directors, nor even all who participated in the wrongful act, as defendants; but any one of them may be sued singly.[1] In this case, however, the declaration is insufficient if it alleges simply that this sole defendant did an act which could in fact be done only by several directors. The allegation must be that he, together with others, did the act, neither is it sufficient simply to allege that he has done wrongful acts. The nature of the acts should be set forth in general terms; though an accurate description of each part or element going to make up the entire act complained of must often be impossible and may be dispensed with. Thus if the fault lay in discounting a number of notes in excess of the amount allowed by law, it is sufficient to declare generally that such excessive discounting has been performed, without describing the precise notes and loans through which it was done. An allegation that by reason of the act the plaintiff's shares depreciated in value, is a sufficient allegation of loss. That the directors declared a dividend out of the capital stock of the bank instead of out of earnings is a good cause of action. Nor is it a defence that the shareholder who brings the suit has himself received the dividend upon his own shares, provided that he did not know at that time the improper basis upon which it had been declared.[2] It

[1] Conant *v.* Seneca County Bank, 1 Ohio St. 298; Buell *v.* Warner, 33 Vt. 570; Foster *v.* Essex Bank, 17 Mass. 479. Per Pickering and Webster *arguendo*, and by implication in the judgment of the court.

[2] Gaffney *v.* Colvill, 6 Hill, 567.

has been held in Massachusetts that the suit must be brought in contract, and that an action sounding in tort will not lie. The portion of the opinion which lays down this rule is clear and conclusive, though it was gratuitously advanced by the court, the point not being strictly necessary to the decision of the cause.[1]

But the right of action of the shareholder, and the claim on which it is founded, though good as against every member composing the board of directors, yet run against them as individuals and not in their official capacity. It is their private indebtedness which must be discharged by them from their private property. The corporation is in no sense liable for it, though the act out of which it arose was that of the corporate government acting officially. The suit could not be brought against the corporation, and corporate funds could not be used to compound or discharge it. Hence it follows that a shareholder cannot avail himself of a claim of this nature by way of set-off against a debt due from himself to the bank.[2]

[1] Vose v. Grant, 15 Mass. 505.

[2] Whittington v. Farmers' Bank, 5 Har. & J. 489.

CHAPTER X.

RIGHTS OF ACTION AGAINST BANKS.

Customer's Right of Action for refusal to honor his Check.

WE have already stated that a bank is under obligation to pay the checks, drafts, and orders of a depositor so long as it has in its possession funds of his sufficient to do so, and which are not encumbered by the attaching of any earlier lien in favor of the bank. The duty of the bank to make such payments, and the reciprocal right of the depositor to have them made, arise from the contract to that effect which, though probably never definitely expressed, will always be considered to be implied from the usual course of the banking business.[1] This duty and this right are so far substantial that if the bank refuses, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank.[2] It has been said that if in such action the customer does not show that he has suffered a tangible or measurable loss or injury from the refusal, he shall recover only nominal damages.[3] But the better authority seems to be that even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check can be wrongfully refused payment without some

[1] *Ante*, pp. 29, 247, and authorities there cited; Byles on Bills, Sharswood's Ed. p. *18; Downes *v.* Phœnix Bank, 6 Hill, 297.

[2] Grant on Bankers and Banking, p. 45; Whitaker *v.* Bank of England, 6 Car. & P. 700; 1 C. M. & R. 744; Marzetti *v.* Williams, 1 Barn. & Ad. 415; Watts *v.* Christie, 11 Beav. 546; Rollin *v.* Steward, 14 C. B. 594.

[3] Watts *v.* Christie, *supra*; Marzetti *v.* Williams, *supra*.

impeachment of his credit which must in fact be an actual injury, though he cannot from the nature of the case furnish independent distinct proof thereof. It is as in cases of libel and slander, which description of suit, indeed, it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and business repute. Special damage may be shown, if the plaintiff be able; but, if he be not able, the jury may nevertheless give such temperate damages as they conceive to be a reasonable compensation for that indefinite mischief which such an act must be assumed to have inflicted according to the ordinary course of human events.[1]

The precedents from which an idea of the due and proper amount of damages which may be awarded where no special damage has been shown, are rare. In the case last cited the check drawn was only for £87 7*s.* 6*d.*, but the court seemed to regard the very smallness of the check as rather constituting grounds for greater damages than otherwise. For Lord Tenterden remarked, that it was a discredit to any person, and peculiarly to one in trade, to have a "draft for so small a sum refused." The jury had at first found for the plaintiff with only nominal damages; but the case having been given to them again, under the instructions to find substantial damages coupled with the remark above quoted, they next returned a verdict for £500 damages. This seemed an equal error in the opposite direction. The court intimated that it was a very large sum, and the case was finally disposed of by arrangement of the parties between themselves that £200 should be paid as damages.

To the customer's suit for damages the bank may answer in defence that it had not unpledged funds enough belonging to the customer to pay the check or draft in full at the time of presentment and demand. For a bank is never held to make a partial payment upon a check.[2] So if the bank has accepted, or in any manner pledged itself or made itself liable to pay

[1] Rollin *v.* Steward, *supra*. [2] In the Matter of Brown, 2 Story, 512.

checks, drafts, or orders of the same drawer to such an extent that after reserving enough to meet their obligations the balance to his credit would not suffice to meet the check in full, the bank need not, indeed must not, make any payment at all upon the same.[1] But if the bank itself at the time holds the promissory note or other business paper of the customer, which has not yet matured, it has no right to set aside funds enough to secure the payment of this when it shall mature, and then to refuse payment because the balance after such appropriation does not equal the sum drawn for. It is only under authority of a Court of Equity that a bank can claim any lien on funds of its depositor to secure paper of his held by it, and still undue.[2] Further it is a good defence if the bank shows that funds of the drawer sufficient to make his credit good to meet the amount of the check had been paid into the bank so immediately before the presentment of the check that the bank had not had a reasonable time to avail itself of the deposit. What is such reasonable time will depend upon the circumstances of each individual case. The general magnitude of the business of the bank, and especially the amount of business which happened to be transacting in the bank in the interval between the deposit and the presentment, also doubtless the organization and system of the bank in relation to such matters, the numerical strength and arrangement of its clerical force, and other similar matters, may be put in evidence by either side to sustain its position. Ordinarily reasonable time would seem to be only till the bank could have a fair opportunity to "avail itself" of the funds, that is to say, get them into a condition such that it can mingle them with its general funds, and use them as money, and to communicate the fact of the deposit to the proper clerks.[3] In Rollin *v.* Steward a deposit was made at one o'clock, the check was presented at three o'clock on the

[1] Kymer *v.* Laurie, 18 L. J. Q. B. 218.

[2] *Ante*, p. 445.

[3] Grant on Bankers and Banking, p. 45; Whitaker *v.* Bank of England, 6 Car. & P. 700; 1 C. M. & R. 744; Marzetti *v.* Williams, 1 Barn. & Ad. 415; Rollin *v.* Steward, 14 C. B. 595.

same day, and the interval was held such a reasonable time that the banker was obliged to pay damages for refusing to pay it, though he remarked at the time that it might very probably go through the clearing house the next day, and in fact did pay it on the next day.

Precisely what is the signification of the requisition that the bank should have time "to avail itself of" the funds deposited, is clearly indicated by no judicial decisions. If the funds be current money, for example native gold or silver coin, simple receipt thereof and time to notify the paying clerks is sufficient. So doubtless if they be bank bills or notes, provided they be in general circulation in the community for the full value expressed on their face. If A. deposit with his banker the check of B. also drawn on the same banker, time enough to examine the account of B. and if it be good for the amount to transfer the same to the credit of A., would also doubtless be a reasonable time. But if A. deposit in his bank the check of B. drawn on another bank, the naked unqualified rights of the bank certainly cover a much longer period. In such a transaction A. simply makes the bank his agent for the collection of the check, with the understanding, express or more usually implied, that the amount when collected shall be placed to his credit. The bank of deposit has the ordinary time allowed for presenting the check to the drawee bank and demanding payment; a time which by the ordinary rule of the common law extends to the close of banking hours on the day following that of the deposit, but which may be restricted to a less period by the usage of the clearing house. Then the credit is or is not given to the depositor, according as the check is or is not honored.

These are the strict, as we have said the unqualified, rights of the bank and depositor. But practically these rights are capable of qualification through the custom and course of dealing established between any bank and any individual dealer. If the bank is wont at once on receiving such a check of a third

party drawn on another bank to give the customer credit for the amount and to allow him instantly to draw against his credit or balance thereby created, then it is possible that this habit may exhibit the traits of a legal usage, and may therefore suffice to create an implied contract between the parties, which will bind the bank to cash the customer's checks drawn against a deposit of such other checks at any time before they have been presented for collection.

But though there is no legal objection to the establishment of such an usage as this, there are strong practical obstacles. A bank may be willing in ninety-nine cases out of a hundred to risk the goodness of the check deposited. But its mere willingness in each one of these cases to waive the full exercise of its strict right would not alone, *per se*, operate to deprive it of the right in the case wherein it desired to exercise it. A habit to do a favor to a customer when it seems safe, is not a legal usage creating an obligation to do a like act when it seems unsafe. Strictly the custom, whether a legal usage or a mere habit, is not always and unconditionally to regard deposited checks as money before they are actually collected, but to do so at the bank's discretion. That the discretion happens to operate favorably for the customer in any number of consecutive cases or for any length of time, affords no cause for expecting or insisting that it shall continue to act so in any particular future case. Whence it follows that something in the nature of a tacit understanding operating to give a color to the naked habit, must be shown in order to establish the legal usage; which, however, when established will be intrinsically valid.

It has been stated, in the chapter on Depositors, that undoubtedly the sound rule of law does not allow the depositor to sue the bank for his balance until after demand of payment has been made by himself or by some one on his behalf, or holding his order, and has been refused by the bank. One exception to this rule, not before noted, may be appropriately

stated here. If the bank has obtained the money by fraud, or through an illegal contract, suit by the depositor lies at once, without demand. So where money was paid in and a receipt taken from the cashier, stipulating that payment should not be made before a certain day, thus in fact making of the transaction a loan to the bank, being a contract which in this instance the cashier had not power to enter into on behalf of the corporation, it was held that since the contract was illegal and the bank could only claim to withhold the money from the owner by virtue of this illegal contract, it should not be entitled to a prior demand, but the owner might sue immediately.[1]

Right of Action when Payment is made in False Coin or Paper.

Occasionally it occurs that payment by the bank is made in counterfeit or spurious coin, or in forged paper. Such a payment is of course null and void. It is no discharge of the bank; and in strict law it is really not a payment at all. In such case it seems that a suit by the depositor, as for dishonor of his check, will lie in the same manner as if the non-payment of his order had occurred in any other manner through the fault of the bank. For though the bank may have offered the false money unintentionally and so may not be morally in fault, yet at strict law it has not fulfilled its legal obligation, and it must answer for its failure to do so. Its honest intent could only prevent the awarding of punitive damages. Its undertaking is absolutely to pay the depositor's check. It has not done so. It is true that it designed to do so; but its own ignorance or carelessness was the cause of its not carrying the design into execution. Though not maliciously it has yet wrongfully inflicted a mischief, and that mischief it must make good. It cannot be mulcted vindictively; but it must pay for the actual damage.[2]

Much stronger is the case where the bank tenders to the

[1] White *v.* Franklin Bank, 22 Pick. 181.
[2] Grant on Bankers and Banking, p. 88.

holder of the check the bills or notes of a bank which it knows, or suspects, or which it has reason to know or suspect, to be in failing circumstances; so that the bills or notes are of doubtful value or likely rapidly to depreciate. In such case the act of the bank is indefensible and even positively fraudulent. It cannot plead innocence of intention, and there is no reason why the depositor should not recover damages to the same extent to which he could recover for any other utterly wilful and causeless refusal to meet his drafts.[1]

Holder's Right of Action on a Check.

The editor of Judge Story's work on "Promissory Notes,"[2] says: "Whether the holder can maintain an action in his own name against the drawees, if they refuse to pay the check, having sufficient funds of the drawer wherewith to pay it, is not entirely agreed." A safer or more incontrovertible statement was never ventured upon by any writer on legal topics. Indeed when one comes to examine the authorities which range themselves on either side, and to investigate the chains of reasoning by which these authorities respectively seek to support themselves, the tale of the two honorable knights who fought about the question of whether the shield between them was golden or silvern, is forcibly brought to mind. Each line of argument in its turn seems the more correct, and the more satisfactorily backed by respectable vouchers.

We will give, as we deem to be our duty, a complete and impartial chronicle of the controversy, and only at the close thereof, when the reader is competent to value it at its true worth, shall we venture to give modest utterance to the views which our labors and investigations have induced us to adopt in the matter: —

[1] Grant on Bankers and Banking, pp. 41, 42.

[2] Ed. of 1868, § 489, p. 670. So also in the Matter of Brown, 2 Story, 516, per Story, J.; Sharswood's note to Byles on Bills, p. *21 (Sharswood's Ed.).

The authorities cited below[1] are customarily adduced as supporting the doctrine that the holder has no right of action. Other cases have been sometimes added, but they do not bear precisely upon the point, and can add no weight to this long array. Whoever will be at the pains to examine all the originals of these citations will see that the instruments which, in nearly every cause, the courts had directly to consider and to pass upon were either bills of exchange or drafts and orders drawn upon individuals. With regard to business paper falling within either of these descriptions, therefore, so great an accumulation of authority might seem to settle the law. But checks when they are named in these opinions, are only mentioned to be grouped with various other sorts of paper to which this rule is declared to be applicable, and therefore so far as they are concerned, the statements of the judges are strictly *obiter dicta*. But that they are so often referred to in this connection, and that all these causes are customarily cited in the cases which have arisen concerning them shows how widespread is the conviction that for the purpose of this discussion their analogy to bills of exchange ought to predominate and

[1] National Bank *v.* Eliot Bank, 20 Law Reporter, 138 (Abbott, J., dissenting). The opinions of the court and of the dissenting judge, in this case, are a long review of all the authorities then existing upon each side of the question. New York Bank *v.* Gibson, 5 Duer, 574 (bill of exchange); Chapman *v.* White, 2 Seld. 412 (bill of exchange, or draft); Bellamy *v.* Majoribanks, 8 Eng. L. & Eq. 523; Malcolm *v.* Scott, 5 Exch. 601 (order on an individual, not a banker); Cowperthwaite *v.* Sheffield, 3 Comst. 243 (bill of exchange); Winter *v.* Drury, 3 Sandf. 263, note a, appended to Marine & Fire Ins. Bank *v.* Jauncey, id. 259. The former case was affirmed on appeal in 1 Seld. 525 (both concern bills of exchange); Williams *v.* Everitt, 14 East, 582; Yates *v.* Bell, 3 B. & Ald. 643; Luff *v.* Pope, 5 Hill, 413 (order, on time, on an individual, not a banker); Grinnell *v.* Suydam, 3 Sandf. 133 (bill of exchange); Harris *v.* Clark, 3 Comst. 93; Mandevile *v.* Welch, 5 Wheat. 277 (bill of exchange). But see discussion of these cases, *post*, p. 463; *semble*, they are both really to the *contrary* effect. Stewart *v.* Fry, 7 Taunt. 339; Grant on Bankers and Banking, pp. 7–9; Dana *v.* Third National Bank, 13 Allen, 445. The case concerned a bill of exchange, but the court *added* checks, as belonging to the same *genus* and governed by the same rule. As regarded *checks*, the remarks were *obiter dicta*. Loyd *v.* McCaffrey, 46 Penn. St. 410, lays down the rule, though the facts of the case did not really call for its enunciation.

the law concerning the two cognate instruments should be taken to be identical.

The principle of law which alone affords a firm and sufficient basis for the doctrine of these cases is that stated in the case of Chapman *v.* White. The instrument to be considered in that case was a bill of exchange, or draft, but the legal reasoning was the same which must be applied to checks if the same rule is to govern them. This is simply that there is no privity between the holder and the drawee, which will sustain a suit by the former, until the latter has done some act, as acceptance, by which he creates that privity. The only original contract in existence is one which runs exclusively between the depositor and the bank. The holder of the check has never been a party to it, and it is only when he has succeeded in initiating and perfecting a second contract, running betwixt himself and the bank, that he can have any basis whatsoever for an action against the bank. Such second contract is consummated by the bank's accepting, or promising, or otherwise binding itself directly to him, the holder, to pay him the sum.

All the authorities which have held that a check does not operate as an assignment or appropriation, *pro tanto*, of the drawer's deposit in favor of the drawee before acceptance by the bank, are adduced. For if there is no assignment or appropriation, before such acceptance, it is argued that the bank holds nothing for the holder or subject to his order. There is nothing which he can demand from the bank, or which the bank is under any obligation to hand over to him. Until an appropriation or assignment has been perfected, it is said, no ground of action has come into existence. Substantially this amounts only to saying, in a less distinct shape, that there is no privity between the bank and the check-holder. It is obvious, beyond a question, that the mere drawing and delivery of a check, unless supplemented by something more, can by no possibility be regarded as either an assignment or an appropria-

tion, in a legal sense of those terms.[1] It is true that Judge Story, In the Matter of Brown (*supra*), says a check is an "absolute appropriation" of the sum named therein, in the hands of the bank, for the benefit of the check-holder. But the most superficial glance at the context of this statement shows that it is not in conflict with the rule as above laid down. Judge Story is viewing the relation of the drawer to the payee of the check, not of the bank to either of them. He intends simply to declare that the delivery of the check operates as a virtual, tacit undertaking of the former with the latter that there is that amount of money to his credit in the bank, which shall remain there subject to be drawn out upon presentation of this instrument, whenever made. He by no means intended to assert that there was such a change in the technical legal title to a portion of the drawer's credit, as placed the title to that portion in the payee even as towards the drawer, much less as towards the bank.

That familiar rule of law is also frequently adduced which declares that a draft or order, calling for the whole of a particular fund operates as an assignment, but otherwise if it calls for

[1] Dana *v.* Third National Bank, 13 Allen, 445 (bill of exchange). The remarks so far as they relate to checks are *obiter dicta;* and the court finally declares its actual decision to be confined to cases in which the check is for more than the customer's balance, when it is said, very properly, that even its presentment for payment establishes no lien on that amount, being less than the whole sum called for, which the bank has to the drawer's credit. Lunt *v.* Bank of North America, 49 Barb. 221. This case only decides that a check is not so far an assignment of the drawer's funds, complete upon delivery, as to take precedence of a later assignment "of all property now belonging to" the drawer, executed and completed before a presentment of the check. It is a *cognate* principle to that which commands that checks be paid in order of presentment. Chapman *v.* White, 2 Seld. 412 (bill of exchange); Bullard *v.* Randall, 1 Gray, 605; Butterworth *v.* Peck, 5 Bosw. 341; Mandevile *v.* Welch, 5 Wheat. 286. But see discussion of this case, *post*, p. 468; Harris *v.* Clark, 3 Comst. 98. In this case the court say that no authorities declare that an ordinary unaccepted bill of exchange operates *per se* as an immediate and complete appropriation or assignment, — and this not even in equity — save only the case of Corser *v.* Craig, 1 Wash. C. C. 424, which case has been since overruled on this precise point by the authority of Mandevile *v.* Welch (*supra*). The court expressly decline, however, to bring checks into the same category.

only a part of such fund; and that a draft or order calling for the whole, *a fortiori*, calling for a part, of a general fund, does not operate as an assignment either of the whole or of the part.[1] The deposit of the customer with his banker is clearly a general fund, and a check is in the vast majority of cases drawn for a part only of that fund; so that we have the very uttermost force of the foregoing rule applied directly to the case of the ordinary check. Neither is it probable that the rule could be successfully called in question, though some judges have intimated doubts as to its correctness. If any part of it is liable to be overthrown, it is only that portion which says that an order or draft for the *whole* of a *general* fund is not an assignment of it; and it is very rarely that this would apply to checks, which are not often drawn for the precise balance of the customer.

Such are the arguments, and such are the judicial authorities for regarding these arguments as satisfactory and conclusive, which are encountered on the side of refusing to the check-holder a right of action. It will be seen that all the abstract propositions of law on which they rest are sound. It appears to be always a difficult and sometimes an impossible task, to find a flaw in the logical and technical train of reasoning which is based upon these propositions. The only question must be, whether the propositions and the reasoning apply to checks, or whether any other principles of law will come in to divert or modify their application. In fact, to a direct assault the fortress which protects this doctrine is impregnable. It is only to a flank movement that it offers a less formidable resistance.

The case of Mandevile *v.* Welch (*supra*) is usually cited among the authorities which are opposed to the right of the check-holder to sue. Yet it is in this very case that the court

[1] Mandevile *v.* Welch, 5 Wheat. 286, cited and relied upon in Harris *v.* Clark, 3 Comst. 93. (Both being cases of bills of exchange and the latter expressly excepting checks from the expression of its opinion.) Bullard *v.* Randall, 1 Gray, 605; Winter *v.* Drury, 1 Seld. 525; Loyd *v.* McCaffrey, 46 Penn. St. 410.

touches for the first time the key-note of the true contrary doctrine. The learned judge is not speaking of checks, but of bills of exchange, and is discussing the point whether the bill is an assignment of the funds in the hands of the drawee prior to his acceptance of it. He is clearly of opinion, equally on the abstract principle and the recognized authorities, that the bill does not operate as such an assignment, a doctrine which must now be assumed to be established law. The chain of his legal reasoning is as follows: Where an order is for the whole of a particular fund, it is an equitable assignment thereof, and after notice to the drawee it binds the fund in his hands. But where it is drawn either on a general or a particular fund, for a part only, as was the fact in the case under consideration, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he accepts *or unless an "obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract."* The reason, he adds, is plain: A creditor cannot split up one cause of action into many. A debtor undertaking to pay an integral sum to one person, cannot be obliged to pay in fractions to other persons. It is worthy of note that the "reason" adduced by the learned judge, and which is not anywhere stated, or indirectly implied, by him to be applicable to checks, is evidently not applicable to them. A depositor *has* an undeniable right to draw any number of checks he chooses against his balance, and he may bring his separate suit for damages upon each one separately for the refusal of the bank to pay it on demand.[1] Plainly therefore checks are at least taken out of the *reason* which is the basis of the proposition laid down as governing bills of exchange. But the exception expressly made by the judge of paper upon which the obligation of the drawee to pay may arise, as matter of law, from an *implied* contract growing out of the usage of trade or the custom of dealing between the parties, seems to have been inserted for the express

[1] For authorities for this statement, see *ante*, pp. 29, 30.

purpose of leaving open the door for putting a different construction upon precisely such instruments as ordinary bank-checks.

It is impossible to deny that if the analogy of bills of exchange is to be conclusive on this question, the effort to give the check-holder a right of action against the bank must utterly fail. It is equally certain that the check-holder has no privity in the naked contract of the bank with the depositor. He was neither primarily a party to it; nor has he subsequently become a party by any express addition ingrafted on the original agreement. If that agreement was simply and solely the undertaking of the bank to hold the depositor's money subject to his order; if it was a naked unqualified promise, express or implied, made by the bank alone to the depositor alone, without more, then it is clear that the check-holder cannot sue. The correctness of these positions, which have been already explained, is beyond a question. But if this was not the whole of the contract; if there were other component and essential elements; if it was something more than a mere promise by one individual or institution to another, then there may be an opening for the third party, the check-holder, to enter through. That there are such additional elements beyond the simple promise of the bank to the depositor, can be shown only by proof of a usage of business, or a course of dealing between the parties. If it is true that such an usage or such a course of dealing can be shown to be so universal and so well understood that it must be assumed to enter into and form a part of the contract between the depositor and the bank, then the check-holder is entitled to any rights, be they of action or any other description, which the usage or course of dealing accord to him. If they entitle him to demand payment from the bank *as a distinct right* enuring to him, then his right to sue for a refusal of payment follows as an inalienable corollary. So far the usage or course of dealing enters into the contract *for his benefit;* so far it is a provision of which he and he alone is entitled to take

advantage. It at once annihilates the argument from analogy and does away with the obstacle of a want of privity.

The accurate and careful saving of this exception by Judge Story, involving all these necessary consequences, was quite too significant to escape notice. The only principle which could give a check-holder a right of action had here been enunciated, and though it was in a different connection, yet in time the seed thus sown bore fruit. In the case of Harris *v.* Clark[1] decided in New York in 1849, the court recognized the doctrine laid down in Mandevile *v.* Welch as sound in its application to bills of exchange, but at the same time availing itself of the exception, said that the rule might not be so reasonably applied to matters of checks, which are practically equivalent to a transfer of actual cash. There are plausible if not solid reasons for saying that a check works a transfer from the time of presentment for payment, owing to the understanding of all the parties, and to the usual course of business. The same cannot be predicated of bills of exchange, which are not so equivalent to cash, and which are not expected to be paid on the spot, immediately on demand, like checks.

Other authorities, which though they may perhaps be of somewhat less weight, are yet more specific and direct, support the same view. Thus it was said in Fogarties *v.* State Bank,[2] that the holder of a check had a right of action in *assumpsit* against the bank, if it refused to pay the check when it had funds of the drawer available for doing so, *upon the implied promise which the law raises in his behalf.* The idea would have been more satisfactorily expressed if it had been intimated that the law raised this implied promise only from the usage or course of dealing of the parties or of the community generally. Perhaps the court thought this ground of its ruling to be clear enough without specific exposition; certainly no other basis readily suggests itself, and the logical sequence may be assumed to be obvious. It was further asserted that this was

[1] 3 Comst. 93. [2] 12 Rich. Law, 518.

true *especially* where the bank charter stipulated that the bank should " receive money on deposit, and pay away the same to order free of expense." It was hardly worth while for the learned justices to bring forward so insignificant a prop. They had taken a ground that was either tenable without this, or else could not be made tenable at all. The language, directing the bank to do only what every bank that ever existed must do as a part of the most simple and ordinary phase of banking business, language expressing only what would be regarded as implied in all charters without any distinct expression at all, could hardly have any such powerful alterative effect upon the ordinary rights of check-holders, as to confer upon them the right of suit. A similar view is implied though not directly laid down in Vanbibben *v*. Bank of Louisiana.[1] Also in Illinois in the case of Munn *v*. Burch.[2] It is said that immediately upon presentment and demand for payment, the bank, having funds sufficient of the drawer to pay the check, thereafter holds the amount *for the holder*, and no longer for the depositor. Thus a privity is created upon which the check-holder may sue. The court does not explain on what basis this obligation of the bank to hold for the benefit of the check-holder is built up. But it is clear that since it arises from no express promise to or agreement with anybody, it must arise from an implied promise or agreement, and no ingenuity can suggest any implication arising from any other source than the usages of business and the course of dealing of the parties.

This principle was again enunciated in the case of the Chicago Marine and Fire Insurance Company *v*. Stanford,[3] so that it may now be regarded as settled law at least in the State of Illinois. It is laid down by Grant in his Treatise on Banking.[4] Finally in the English case of Ancona *v*. Marks,[5] Baron Martin says, " There is no doubt that the bearer of a check is entitled

[1] 14 La. Ann. 481.
[2] 25 Ill. 35.
[3] 28 Ill. 168.
[4] Grant on Bankers and Banking, p. 91.
[5] 7 Hurl. & N. 686.

to receive the money; . . . whoever has possession of it as bearer[1] may maintain an action upon it." In this case there were two instruments sued on, one was a bill of exchange, but the other was an ordinary bank-check. The decision is a very recent one, having been rendered no longer ago than 1862. Judge Sharswood in his note to p. * 21 of his Edition of Byles on Bills says, that it might perhaps be inferred that a check duly presented (*i. e.*, of course, for payment) becomes an appropriation of so much of the drawer's funds in the banker's hands, and that if payment be subsequently stopped and all the drawer's funds withdrawn, the bank remains still liable to the holder. He acknowledges on the strength of Bullard *v.* Randall, *supra*, that this seems to be still unsettled. But he adds, as his own view, that though the rule does not govern bills of exchange, yet they are not held to be an equitable assignment or appropriation of the sum drawn for, whereas a bank-check is so considered; and if the holder be one for value, against whom the drawer cannot rightfully revoke, why then should not the banker, upon distinct claim and notice, be held bound by the equity?

The force which is inherent in this argument from usage and the course of dealing seems to us never to have been fairly brought out. Neither in Mandevile *v.* Welch nor in Harris *v.* Clark were checks directly under discussion; and in the other American cases the decisions are meagre. To our minds it is the most satisfactory thread in the labyrinth. It leads around all the difficulties which could not be directly surmounted. It is reasonable, just, and practical. It is not bad law and it is good sense. It meets the real intentions and wants of the business community. There is no question that

[1] All English checks were at that time, by statute, required to be drawn payable to bearer (or to A. or bearer which was the same thing in law). A check payable to the order of any person was, by express provision of statute, subject to be stamped as an inland bill of exchange. This law has, however, since been changed, and checks may now in England be drawn payable to order, without other stamps than those used on a check payable to bearer.

the understanding is perfectly clear and quite universal between all parties alike — bank, drawer, and every successive holder — that the check will be paid on presentment, if the drawer's balance is good for its amount. Checks pass from hand to hand, and are sometimes transferred almost as freely as money in communities where the drawer's name is known to be trustworthy, simply on the strength of this understanding. No bank would ever for an instant pretend that the prompt payment was not a thing which the holder would have a perfect right by universal understanding to expect, and *by universal usage of business*, at least, *to require*. Yet what is a right to expect by virtue of an universal understanding, and to require on the strength of an universal custom of business, save a usage, in the legal sense of that phrase, which will be sustained by the courts as valid provided it is not tainted with any intrinsic illegality? Certainly it will not be maintained that such illegality exists in the matter under discussion. There can be no possible difficulty in assuming in view of the well-known conduct of all banking institutions, and the multitude of daily transactions which the entire community bases and is obliged to base upon this well-known conduct, that the undertaking of the bank to pay the depositor's check is designed to enure, and by virtue of this intent and of usage in accordance therewith, actually does enure, for the benefit of the holder of the check, and does raise such an implied agreement as will suffice to overthrow the technical obstacle to his obtaining his rights which grows out of a supposed want of privity between him and the bank. We cannot but feel assured that the bank in receiving the deposit, the depositor in drawing his check, and certainly not least of the three the payee receiving it as money, as actual cash, all alike in their respective acts, contemplate and have perfect reference to a well-known usage of banks to answer the demands of the bearers of such documents, if the drawer's credit is sufficient.

It will be seen that this view brings simplicity into the entire

discussion. It leaves uncontroverted all the principles and rules, laid down by those who deny the check-holder a right of action. Nay, it accepts them as sound and embodies them as part of itself. Its effect is only to modify them in their bearing upon a certain class of instruments, and to modify them solely by the aid of well-known principles of law working through facts, than which surely none are more universal or more familiar. Whence it follows that in their application to such instruments these rigid rules of law are found to be at once legal, intelligent, and reasonable, serving to interpret, regulate, and sanction, as all sound and sensible rules of commercial law must, the real wants of men engaged in practical business transactions.

Criticism, too, is demanded in regard to the authorities which hold that a check is not an appropriation or assignment of the drawer's funds until it has been accepted. There are a considerable number of cases in which this broad principle is generally stated. They are all frequently brought up in a massive column to give apparent weight to the doctrine that the check-holder has no right of action. In point of fact they are almost all totally incompetent to perform the function required of them. It is only those in which the statement of law is made with express reference to this very question of the check-holder's right of action that are properly authorities. For the questions are various in reference to which this remark may be made, and its truth in one connection may be perfectly consistent with its falsehood in another. A check is revoked by the drawer's death before presentment: checks are paid in the order of presentment, not in the order of date or delivery; a check may be forbidden to be paid at the bank by the drawer in the interval between delivery and presentment: — these are a few instances, out of very many, of cases where the broad rule may be and has been laid down by courts that the check, before payment, or as it is sometimes and more properly expressed, before *presentment for* payment, works no

assignment or appropriation of the drawer's funds in the hands of the bank. The force of the rule in such cases is evident. Equally evident is it that the general language which may be uttered to meet these facts, though sound for that especial purpose, yet is far from applying to the case where the bank wilfully refuses payment to the holder without excuse existing at the time of the refusal. No such completed appropriation comes into existence at the moment of delivery as to preclude the subsequent consummation of a different appropriation before presentment has been made. Cases of this description simply show that where an excuse exists at the time of demand, which justifies the bank in refusing payment, then no obligation to pay accrues. It makes no difference that the excuse came into being later than the delivery of the check, provided only that it was prior to the demand for payment. But this is different from the case where no justification for non-payment exists at the moment when presentment and demand for payment are made. It is true — and it is all that the cited cases decide — that *before demand for payment* no assignment exists, no obligation has been created, no privity has grown up, and the very right of the bank to pay may be taken away by any one of a great number of occurrences. But the act of presentment and demand, made before any one of these occurrences has taken place, is the act which creates at once, by usage of business and understanding of all concerned, the obligation, the privity, and the appropriation, or at least the right to claim an appropriation.

If then the true force of the cases, which were cited *ante*, p. 462, to the nominal effect that a check does not work an assignment, is only that *prior to presentment and demand for payment*, it does not work an assignment. The trouble with this is that, though good as far as it goes, it does not reach the root of the present matter of discussion. If the right of the check-holder to sue arises from a usage of trade or course of dealing, ingrafted upon a contract in which such a right is not specifi-

cally given in express terms, then it can only accrue exactly in accordance with the requirements which are an integral part of such usage and course of dealing. One of these requirements in this case is that the check-holder shall make a direct and formal demand for payment before he obtains any privilege in the matter whatsoever as against any person. This preliminary demand is a part of that usage, which must be conformed to as a whole, or else cannot be relied upon in any fractional and imperfect shape. Or to put it more plainly, the contract in its perfect form is a composite, of which one part is the express agreement of the bank and depositor, and the other part is made up from the additional elements introduced by the usage, and which by a well-known rule of law are regarded as constituting a part of the contract as much as if they had been expressed in it in terms. This contract, thus compounded, stipulates for and on behalf of the check-holder that so soon as he demands payment he shall receive it, if the bank has unencumbered funds of the depositor sufficient for the purpose. This is his right which enures to him under the composite contract, but by virtue of that part thereof which is called the usage of business. It is for the obtaining of this right that he may sue. But the right is only a contingent one until he has made his demand. The same usage which gives rise to the right requires the demand as an indispensable preliminary. Circumstances occurring before the demand may prevent the right from ever vesting. Thus we see clearly that the whole notion of assignment or appropriation is really alien to the discussion. Nothing is or has been assigned or appropriated to the payee. His first right is a simple naked right arising neither from an assignment nor appropriation, but under a contract to have money paid to him when he demands it; and if the money is not paid, unless the bank can excuse the non-payment by showing the existence of some of these facts which absolve banks from the duty of paying a customer's check, then his next and consequent right is a right to sue the bank upon

the contract for the amount which should have been paid to him.

As a matter of judicial authority, too, the real weight is very clearly on the side of the holder's right of action. A considerable number of cases, as has been heretofore made apparent, are always cited on the other side. These give it an appearance of numerical superiority which is by no means genuine. We have already seen how these hosts of authorities are mustered. They are cases wherein the instruments sued on were more or less *analogous* to checks; or where, in delivering opinions about such instruments, *obiter dicta* concerning checks were gratuitously introduced. On the other hand, it is certainly true that the cases wherein a holder has sued on an actual check, and has been sustained in doing so, are neither very numerous nor of the highest authority. But they possess the important advantage that they go squarely to the very point in controversy. And few though they are, the same remark cannot be made of an equal number of the cases usually arrayed against them. These actions were based *on checks*, and were held to be maintainable. They are all directly, not inferentially or impertinently, in point. If the same remark could be applied to the case of Dana *v.* Third National Bank, the language used by the court in that cause would be very strong against the checkholder's right of action. But the judge is clearly delivering only his abstract and individual views; for he expressly at the close of the opinion warns us that the only point decided is that the presentment of a check, calling for more than the drawer's balance, creates no lien on that balance. So a decision, which at first seems formidable, has at the close nearly all its force carefully extracted.

Finally, it might be objected that the bank, by being made liable to a suit by two different persons, each suit being founded upon one and the same act of the bank, is subjected to undue and needless annoyance. But this is hardly an admissible argument. If by one act two persons are wronged, there is no

reason why one of them should be debarred from obtaining justice, because the other must be allowed to do so. In fact the holder's suit may be limited only to acquiring the exact sum which the bank has in its hands for his benefit. The right of the holder to recover damages has, we believe, never been under discussion; and the rulings in favor of his right of action intend to apply it simply to the obtaining of the sums due him on the check. This clearly the bank should be summarily obliged to pay over. In a suit for damages by the depositor, and, if it could be sustained, also in such a suit by the check-holder, it is to be assumed that the law will see that the bank is not mulcted in a greater sum than its wrongful conduct deserves. If with its eyes open to the necessary and just consequences the bank does an act of malice, injustice, and injury, there is no reason why the specific wrong should not be strictly undone in one suit, although damages in compensation for it are to be sought in another.

CHAPTER XI.

EVIDENCE.

Competency of Bank Officials on Bank's behalf.

IT may now be laid down, in general terms, that the officer or agent of the bank is a competent witness in its behalf, even concerning a transaction which he himself conducted or in which he was interested or engaged. In such cases it must frequently happen that the officer or agent will be personally and closely interested in the determination of the litigation. For if the bank should fail of success by reason of any inaccuracy, irregularity, or wrongfulness in his proceedings, it must be anticipated as a natural result that he will himself be sued by the bank, either upon his official bond or his common-law liability, and held to answer for the consequences of his default, besides suffering all the collateral mischief of a loss of his position and reputation. The latter fact of course could not operate to render him incompetent, but must be confined to affecting his credibility. The former fact however goes directly to the question of his competency. It is not to be supposed that the extension of the general rule to cover these cases has been allowed to take place without opposition. But the several decisions have been uniformly in favor of the admission of the testimony, so that the matter must at last be regarded as definitively settled according to the above doctrine.

The simplest class of cases, those in which the objectors to the competency certainly had but very little ground to stand upon, were those wherein the officer or agent had been formally and sufficiently released by the bank from all manner of claim

which it might have against him, even if he should appear to have been in default. No difficulty seems to have been experienced in disposing of these in favor of the admissibility.[1] The next step in advance was taken in the cases in which some possible question might arise as to the liability of the officer or agent to the bank, by reason of something which it might appear or might be claimed that he had done. But admitting a possibility that he might be held by the bank, yet this was by no means equivalent to the established fact that he certainly could be so held. It was an assumption, which might so obviously prove erroneous, that the court could not be expected to make it. The contingent impropriety of receiving the testimony could not be allowed to have equal effect with a positive impropriety. So again in these cases the narrow question of intrinsic competency was evaded, and the evidence was admitted as it were through a side door.[2] But it was not of course always possible, however much the courts might have wished it to be so, thus satisfactorily to flank the main position of the objectors. Sooner or later the question of the intrinsic competency of such persons as witnesses must arise and must be decided fairly upon its own merits; and it having finally arisen in various States, the courts of each, thus far without an exception, have decided to admit the testimony offered. The Supreme Court of the United States and the text-books on evidence have adopted the same rule.[3] The obvious necessity of the case has conquered all lesser objections. It must be that an officer should be allowed under oath to state what he had done; since otherwise the bank was so

[1] Farmers' & Mechanics' Bank v. Champlain Transportation Co., 18 Vt. 131; 23 id. 186; Johnson v. Farmers' Bank, 1 Harring. 117.

[2] Franklin Bank v. Freeman, 16 Pick. 535; Union Bank v. Knapp, 3 id. 96.

[3] United States Bank v. Stearns, 15 Wend. 314; Farmers' & Mechanics' Bank v. Champlain Transportation Co., 18 Vt. 131; Huntress v. Patten, 20 Me. 28; Jackson v. Bank of the United States, 10 Penn. St. 61; 2 Starkie on Evid. 753, 767 and 768, n. 2; 1 Greenleaf on Evid. 416, 417; Cookendorfer v. Preston, 4 How. (U. S.) 317; Franklin Bank v. Freeman, 16 Pick. 535. See also Wiggin v. Freewill Baptist Church, 8 Met. (Mass.) 301.

utterly tongue-tied that it must fall an inevitable sacrifice to the most unworthy plaintiff, and furnished an obvious temptation to dishonest suits. The same necessity had admitted the testimony of a porter to the fact of his having delivered goods for his employer; and had allowed factors and brokers, even when receiving a percentage for commission, to testify in behalf of their principals.

Shareholders as Witnesses.

A shareholder in the bank, by assigning away his stock, may render himself a competent witness in its behalf. Neither is it too late for him to make the assignment after the suit has been begun.[1] If a statute of the State in which the bank is incorporated declares stockholders to be liable to the holders of notes of the bank in case of the insolvency of the corporation, the contingent liability under this law of one who has at any time previous been a stockholder will not impair his competency as a witness. His interest in the affairs and prosperity of the bank is too remote to be permitted to have this effect, at least unless there is some evidence of inability on the part of the bank to meet its liabilities.[2]

Customs and Usages.

The customs and usages of a bank in the regulation and conduct of its business and daily affairs may be given in evidence for the purpose of corroborating testimony already given, when, if offered independently, they would be inadmissible. Thus where the plaintiff's assertion that a deposit of a certain amount had been made by him on a certain day had been directly contradicted by the officer of the bank, who testified positively that no such deposit had been made or was entered on the books, it was held that the officer might go on to state what

[1] Meighen *v.* Bank, 25 Penn. St. 288.

[2] Ibid.; citing also Willing *v.* Consequa, 1 Pet. 301; Curcier *v.* Pennock, 14 Serg. & R. 51; Irwin *v.* Lumberman's Bank, 2 Watts & S. 190.

was the usual course of business in the bank and pursued by himself, from which the unavoidable inference must be that no such deposit could have been made without his knowledge or without his having entered it on the books. Had the effort been to supplement the mere fact of the non-entry by the evidence of the usage as an independent additional fact, the question raised upon the admissibility would have been different and would doubtless have been decided differently. But the officer had positively alleged the non-receipt of the deposit, and he only *corroborated* this assertion by giving his reasons and means of knowledge.[1]

Of course if the fact of the usage itself, or of conformity to the usage in the particular case, is the matter which is itself under discussion, testimony descriptive of the usage is strictly admissible. So it has been held that where the sufficiency of demand and notice is in question, the notary public who performed these duties may state what his usual practice is; for he may state what he did in this especial case, and may then state that it conformed to his usual practice. Nay, he may even go farther and state that he believes it to be in conformity also with the usual practice of other notaries in the same city.[2]

Explanation of Mistakes.

Any mistake, accidentally made by an officer, in a transaction on behalf of the bank, may be explained by his own evidence of the circumstances.[3]

Declarations of an Officer or Agent.

Declarations and admissions of the officer or agent of a bank bind the bank only when they are made by him officially with the intent of binding the bank, and either within the scope of his general official employment, or by virtue of a special

1 Meighen *v.* Bank, 25 Penn. St. 288.
2 Cookendorfer *v.* Preston, 4 How. (U. S.) 317.
3 Bank of South Carolina *v.* Rose, 1 Strobh. Eq. 257.

authority lodged in him by the directors. Otherwise, like the remarks of any third person, they are utterly incompetent.[1] The declarations of directors, even, more than those of other officers, are impotent to bind the bank; for the reason that no individual director, as such, has any power whatsoever in reference to the affairs of the bank. Consequently it is difficult, or impossible, for him to commit it to any thing, even to knowledge. Only when and as he is acting in conjunction with his co-directors, is he intrusted with what may be described as an undivided share in the general administration of its affairs. But to him individually, at least in his capacity strictly of director, no department of those affairs is allotted, and his sole admission or declaration in any department is therefore in excess of both his duty and his authority, and is null and meaningless in law.[2]

As a general rule statements made by a bank officer concerning any past transaction, though the matter to which they refer is one which falls within the scope of his employment, will not be regarded as binding upon the bank. They are considered to be given simply as a matter of favor to the inquirer. The officer owes no duty to the bank to answer interrogatories which relate only to a completed transaction. He is not employed for that purpose, or held out by the bank as intrusted to fulfil such a function. The interrogator simply requests a favor from the officer personally, which if granted can create no liability as against the bank.[3] But an exception will arise to this rule where the officer of the bank knows that his answer to the inquiry is to form the ground of future action on the part of the inquirer, so that accurate information is not

[1] Stewart *v.* Huntingdon Bank, 11 Serg. & R. 267.

[2] Hartford Bank *v.* Hart, 3 Day, 491; Pemigewassett Bank *v.* Rogers, 18 N. H. 255; Loomis *v.* Eagle Bank, Disney, 285. See also Soper *v.* Buffalo and Rochester R.R. Co., 19 Barb. 310.

[3] Pemigewassett Bank *v.* Rogers, 18 N. H. 255; Franklin Bank *v.* Steward, 37 Me. 519; Lime Rock Bank *v.* Hewett, 52 Me. 531; Franklin Bank *v.* Cooper, 39 id. 542; Sterling *v.* Marietta and Susquehanna Trading Co., 11 Serg. & R. 179.

merely desired to satisfy a curiosity as to an occurrence wholly in the past, but is sought and needed for governing important dealings in the present and future. So, too, if the declarations or admissions, though relating to something that is in mere point of time past, yet have for any reason a present interest and weight or from any combination of circumstances assume a still subsisting importance, they will then be admissible as constituting a part of the *res gestæ*, without regard to the fact that the precise act itself to which they relate was, strictly speaking, concluded some time before. Thus where a person who had been called in to pay a note, insisted that it had been paid; and in the discussion the president examined the books of the bank, became satisfied of the payment and admitted it to have been made; it was afterward held that evidence of his admission was competent to bind the bank, because it in fact constituted a part of the *res gestæ*, and was made by him in the execution of his ordinary official duties.[1]

[As to evidence furnished by officials, or proof of their declarations or admissions, see also the chapter on the "Powers, Duties, and Liabilities of Officers," in which many of these matters are discussed.]

Books of the Bank, and Bank-books.

The books of the bank are admissible in evidence on its behalf. The reason, as laid down in a well-known Massachusetts case, is that depositors have a right "on all proper occasions" to inspect the books of the bank, and therefore the officers having charge of these books are the agents of both parties in this portion of their employment. Also, because the depositor's own bank-book is a transcript of the books of the bank and in effect operates as a mutual acknowledgment between the parties as to their money dealings.[2] This line of reasoning will

[1] Franklin Bank *v.* Steward, 37 Me. 519; Bank of Monroe *v.* Field, 2 Hill, 445.

[2] Union Bank *v.* Knapp, 3 Pick. 96; Watson *v.* Phœnix Bank, 8 Met. 217 (following and relying upon the preceding).

hardly commend itself as perfectly satisfactory. Practically speaking, the right of the depositor to examine the books of the bank must be exceedingly limited, and the "proper occasions" could hardly be supposed to occur often enough to make the book-keepers really and in any reasonable sense of the phrase, the agents of the depositor. They are in no manner under his supervision, nor would it be possible for him daily to examine their entries, even if the courts should hereafter feel able to assert the occasional right of examination above declared to exist, when that question shall be directly raised. Other authorities though content to admit the books in evidence yet lay down a doctrine contrary to that advanced in the Massachusetts opinion, and say that the depositor is *not bound* by the books of the bank since the persons who keep those books *are in no sense* his agents, but are the employees of the bank only. It is true that the Massachusetts judges did not declare, and did not intend to declare, that the depositor would be absolutely concluded by the books of the bank; yet their reasoning was only a proper basis for this conclusion. The discussion of the comparative merits of the different courses is, however, rendered rather unprofitable, by the fact that they lead to the same ultimate conclusion, and that this is too unquestionably sound to suffer from any criticism of the reasoning which has led up to it. Either directly or by implication too many authorities combine to assert the admissibility of the books of the bank, to leave the rule in any doubt.[1]

The entries in the books, when produced, must be verified and sworn to by the clerk who made them, if possible. But if he is inaccessible, proof that the entries are in his handwriting will suffice.[2] The clerk should be summoned in person; for though it is true that the cashier has, as a part of his offi-

[1] Johnson v. Farmers' Bank, 1 Harring. 117; Meighen v. Bank, 25 Penn. St. 288 (by implication; the books were introduced and the theory on which they were kept was allowed to be explained in that case). Town of Concord v. Concord Bank, 16 N. H. 26. Also the next four cases cited, *post*, pp. 481, 482.

[2] Watson v. Phœnix Bank, 8 Met. 217.

cial function, the charge of the books and the superintendence of the book-keeping, yet this does not necessarily imply that personal knowledge of particular entries which is necessary in order that they should be duly proved.[1] It is the actual maker of the daily entries who is needed. An examined copy of the books is, by itself, inadmissible. But it has been said that perhaps, if supplemented by proof that the original entries were made by an officer of the bank, the officer himself swearing to fact, or this if this be impossible, his handwriting being proved, the copy might in a case of sufficient necessity be admitted.[2]

The case of Watson *v.* Phœnix Bank, adopting the views above criticised, which were laid down in the preceding case of Union Bank *v.* Knapp, says that the depositor's bank-book is no better evidence than the books of the bank. Certainly if the doctrine of the last-named case is correct, this is an unavoidable corollary. It has been stated in the chapter on Depositors that the depositor is under no such positive obligation to examine his bank-book when returned to him after its posting by the bank and to correct errors, that his failure promptly to demand a correction can be subsequently construed as an admission of correctness. Nevertheless the fact that he has the opportunity offered him to do this and that any man of ordinary prudence in the conduct of his affairs would do it, must raise a certain presumption of the accuracy of the entries in the bank-book stronger than any presumption which can reasonably arise in favor of the entries in the books of the bank. For these, whatever may be the legal right of the depositor to examine them, he in point of fact never does see. Neither is it correct to say that the value of these two descriptions of entries is equal on the theory, advanced by the judge in Union Bank *v.* Knapp, that the bank-book is a "transcript" of the

[1] Williams *v.* Kelsey, 6 Geo. 365.

[2] Philadelphia Bank *v.* Ex'rs of Thos. Officer, 12 Serg. & R. 49; Ridgway *v.* Farmers' Bank, id. 256.

books of the bank. For this is not the truth. The noting of the checks drawn, that is, the depositor's debit account, is doubtless always made, when the bank-book is posted, from the books of the bank; but the entries of deposits, which form the at least equally important credit side of his account, are made in most cases by the receiving teller when the bank-book and the deposit are offered to him together, and the book is at once returned. No contemporaneous entry is made on the books of the bank, and the credit does not appear upon them until at a later hour of the day it is *copied* on to them from the depositor's memorandum of his deposit which he hands to the receiving teller and which is checked as correct by that officer and retained by him for the very purpose of subsequently making up or enabling the book-keeper to make up the entries in the books of the bank. There are, therefore, obviously much greater means for a mistake to creep into the books of the bank without observation than for the same mistake to appear in the bank-book of the depositor without his observing it. Hence it follows that, if the bank-book of the depositor does operate as an acknowledgment between the parties (Union Bank *v.* Knapp) it is certainly entitled to greater consideration than the books of the bank, which could have the same operation only by virtue of a very questionable legal fiction.

In New York it has been held that, if the bank-book accompanies the deposit and the credit is given in the book at the very time when the deposit is made, it then becomes an original entry and is conclusive upon the bank; though if the book were sent to be written up afterwards this would not be the case.[1] In Maine it has been declared, generally, that any credit in a bank-book may at any time be corrected by parol evidence, like any other receipt.[2] Clearly the credit entries in the bank-book are simply receipts, neither more nor less. There seems to be no reason why they should not be open to correction,

[1] Manhattan Co. *v.* Lydig, 4 Johns. 377.
[2] Lewis *v.* Eastern Bank, 32 Me. 90.

equally with much more formal species of receipts, even though the deposit and the entry be contemporaneous.

The sound rule would seem to be that the depositor's bank-book, if it has been returned to him and he has not within a reasonable time objected to it, should be regarded as *prima facie* evidence of the way the account stood between him and the bank at the date of the last balancing. It settles the presumption in the case and leaves the *onus* on the party disputing it. If it agrees with the books of the bank, well and good; then there can be no use of discussing which of them is the better evidence, since both support the same state of facts. But if it is at variance with the books (unless an error in copying into it the entries of drafts drawn can be shown) the probabilities are that it is the more correct, especially if the credits have always been made at the time the deposits were paid in. These were contemporaneous entries, whereas the entries in the books were copies. The entries of debits or of checks drawn are copies from the books, and a mere error in copying ought to be easily shown and explained. Farther, both parties have had access to the bank-book. The bank itself has made it up, and the depositor, unless he is an exceptionally careless man, has examined it, at least with sufficient care to see that the balance is correct. Every presumption, arising from the actual course of dealing of the parties, favors the correctness of the bank-book to the extent above asserted, that is, in respect to the last balancing, when the depositor has since that time had it in his hands long enough to make it natural to suppose that he has examined it. No equally strong presumptions arise in favor of the books of the bank. This is however strictly a mere presumption that is claimed in favor of the bank-book, which may of course be at any time refuted. The bank may show an error in the credits, which are its receipts, or an error or omission in the debits, which only purport to be a copy from its books and are not an original instrument. The depositor is under no positive legal obligation to examine the book or to

object to its accuracy within any specific time. Therefore it is always open to him after any lapse of time to object to it, precisely as it is open to any person to object to the accuracy of an account rendered to him by one with whom he has financial dealings.

[In this connection see also the chapter on Customers and Depositors.]

Practice.

Where to suit by a corporation the general issue is pleaded, the corporation must prove its legal existence. In New York it was held that even the Bank of the United States was not entitled to be excepted from this rule.[1]

Where a suit to recover upon worthless bills, which have been issued by a banking corporation, is brought against those who are alleged to have been the officers and directors of the corporation, the charter must be proved, if its existence is necessary to make the bank a corporate body.[2]

Parol and Record Evidence.

That a matter is of such a nature that it ought to appear, or might naturally be expected to appear, upon the records or the books of the bank, is no objection to a substantiation of it by parol testimony. This rule is not affected by the fact that the bank offers its books and records, in which no such matter appears. For there is no necessary legal obligation upon a bank, unless by virtue of express imperative legislation, to keep any record, or a thorough record, even of the formal votes of the board of directors. And though express legislation should in any case require such a record to be kept, yet the requisition would probably be only directory in its nature, and if neglected the vote would still remain equally valid, though unrecorded.

[1] United States Bank *v.* Stearns, 15 Wend. 314. But this requirement has since been dispensed with in New York by special statute (2 R. S. 458, § 3). Bank of Genesee *v.* Patchin Bank, 3 Kern. 309.

[2] Gardner *v.* Post, 43 Penn. St. 19.

So also authority, sanction, and ratification, though properly the subject of recorded corporate action, may all be based upon conclusive presumptions of law growing out of acts and dealings and other matters wholly independent of any proceedings appearing of record or capable of so appearing. If the party to the suit seeks to show facts and circumstances which either prove a vote or other corporate action to have been had, or which by legal implication raise in his favor a presumption of such vote or action, the effect of which presumption the law will not allow the corporation to evade by showing that no such vote or action was taken, he may do so by any means in his power. He cannot be shut off from his rights because the means of proving them are not furnished, as they ought to be, by the corporate records. Hence it is a sound rule that the absence from corporate records of notice of a fact, which if it existed ought to be stated there, is not conclusive of the non-existence of that fact and does not preclude positive parol testimony offered to establish it.[1]

Isolated Cases.

In a suit by a bank upon a note the defendant set up in defence that a former cashier of the bank had failed to credit him with some of his deposits, amounting in all to a considerable sum. But the court held that this showed no defence. The matter was too remote to give rise to a legitimate inference in favor of the defendant.[2]

The allegation against a bank of negligence in not maintaining a proper supervision for the purpose of detecting frauds or defaults of officers or agents is sufficiently met by the allegation and proof that the bank has taken the customary and uniform method, adopted presumably by other banks generally, with the object of discovering such matters.[3]

[1] Concord *v.* Concord Bank, 16 N. H. 26; Edgerley *v.* Emerson, 3 Fost. 555.
[2] Lime Rock Bank *v.* Hewett, 52 Me. 531.
[3] Manhattan Co. *v.* Lydig, 4 Johns. 377.

In a suit upon a check payable to bearer, or to "A. or bearer," evidence to show the holder to be the legal owner or legally entitled to hold and sue upon the same is needless. Such paper passes by delivery and the mere fact of possession, without more, is *prima facie* evidence of rightful ownership.[1]

[1] Cruger v. Armstrong, 3 Johns. Ca. 5. See also chapter on Checks, pp. 241 312.

CHAPTER XII.

THE NATIONAL BANKING ACTS.

The questions which have arisen under these acts are not capable of being referred to any general principle. Of necessity they concern only the construction which is to be placed upon certain passages in the law. The simplest and most satisfactory method of dealing with the adjudications which have been rendered in this department of our topic would therefore seem to be to give a simple schedule of them, with the necessary references to the sections to which they relate.

Organization.

Section 6. — Until the "organization certificate" has been made in compliance with the requirements of this section there can be no legal organization of the association. Persons who fail to unite in such certificate, by setting their signatures thereto, are not members of the association. Burrows *v.* Smith, 10 N. Y. 550.

That the plaintiff, suing in the corporate character of a national banking association, existing and organized under and by virtue of the act of Congress, is not legally such, and therefore is not entitled to maintain a suit as such, by reason of having failed to comply with the exact requirements of the act, is a matter which the defendant may fairly plead. But it cannot be tried by affidavit, on motion. National Bank of the Metropolis *v.* Orcutt, 48 Barb. 256.

Re-organization of State Banks.

The Grocers' Bank, established under State laws, reorganized as the Grocers' National Bank, under the act of Congress. When the Grocers' Bank ceased to exist it had a right of action against an officer for fraudulent misapplication of its assets. *Held*, that this right of action was a part of the assets of the State association, and, as such, passed to the national association, and might be prosecuted by it. Grocers' National Bank *v.* Clark, 48 Barb. 26.

A State bank, re-organizing under the act as a national banking association, carrying with it all its assets carries also all its debts and liabilities, which the national bank will be held to discharge. One who at the time of the re-organization is a debtor of the State Association, and also a holder of its bills, can compel the national bank, although insolvent, to receive these bills in payment of the debt. But, *aliter*, where the debt ran originally to the national association, and was put in judgment, and the bills of the State bank were subsequently obtained by the debtor. Thorp *v.* Wegefarth, 56 Penn. St. 82.

President and Directors.

Under the act of February 25, 1863, section 11, it was held that the directors had full power to remove the president at any time, whether by-laws had been adopted by the association and approved by the comptroller or not. Taylor *v.* Hutton, 43 Barb. 195. See *ante*, p. 96.

Courts.

Act of 1864, section 50. A District Court of the United States is a "court of record of competent jurisdiction," within the meaning of the act. Platt's Petition, 1 Bened. C. C. 534.

Suits.

Act of 1864, sections 8, 57. New York. Section 57 does not modify or control section 8. A national bank may be sued in the state courts of a State other than that in which it is situated.

It is a "foreign corporation" within the sense of the Code; since it is organized under the laws of a government other than the State government. Cooke *v.* State National Bank of Boston, 50 Barb. 339.

Contra.

Massachusetts. Act of 1864, section 57. A State court has no jurisdiction over a State bank out of the county or city in which it is established.

In these causes the defendant was an association established in New York; the suit was brought in Boston, and the Globe National Bank of Boston was summoned as trustee. The suits were dismissed, on motion, for want of jurisdiction. Crocker *v.* Marine National Bank. Baker *v.* Same. — Mass. — decided in 1869, report not yet printed.

Preferences.

Act of 1864, sections 50, 52. Where a bank is insolvent, a creditor on general deposit account cannot transfer his credit to one indebted to the bank, so that it may be used by such debtor in set-off. This would be to establish a system of preferences which these sections prohibit.

The act does not vest the assets in the receiver immediately from and after the act of insolvency; neither does the appointment of the receiver relate back to such act. In fact the property in the assets never really vests in the receiver. But the assets themselves are placed under the immediate protection and control of government; and any transfer or dis-

position of them is forbidden to be made until after the receiver is appointed.

The credit on a deposit account is a portion of the assets, and cannot be transferred; neither can a transfer be enforced even by an adversary process against the bank. Venango National Bank *v.* Taylor, 56 Penn. St. 14.

Loans.

Sect. 29. A. had borrowed from the defendant bank a sum exceeding one-tenth of its capital actually paid in, and had deposited collateral security. He became bankrupt, and his creditors filed a bill, praying that the contract of loan should be declared void and the securities surrendered to the assignee in bankruptcy. The bank demurred, and the Court (Giles J. in the Circuit Court of the United States) sustained the demurrer; holding that the contract was not void; and that even if it were, the court would leave the parties as it found them, and would not order the surrender of securities, as prayed for. IV. Am. Law Rev. 397.

Taxation.

Sect. 41. The meaning to be put upon the words "*place* where the bank is located," occurring in this section, has caused much litigation, and the decisions have been far from harmonious. See Austin *v.* The Aldermen, 7 Wall. 694; State *v.* Haight, 2 Vroom, 399; State *v.* Hart, id. 434; State *v.* Cook, 3 id. 347; Opinion of Justices, 53 Me. 594; Packard *v.* Lewiston, 55 id. 456; Mayor *v.* Thomas, 5 Cold. 600.

The discussion has now been put at rest by the amendment of Feb. 10, 1868, which enacts that "place" shall be construed to intend "State."

APPENDIX.

An Act to provide a National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof. Approved June 3, 1864 (Acts of 1863–4 Ch. 106).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be established in the treasury department a separate bureau, which shall be charged with the execution of this and all other laws that may be passed by Congress respecting the issue and regulation of a national currency secured by United States bonds. The chief officer of the said bureau shall be denominated the comptroller of the currency, and shall be under the general direction of the Secretary of the Treasury. He shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate; he shall receive an annual salary of five thousand dollars; he shall have a competent deputy, appointed by the secretary, whose salary shall be two thousand five hundred dollars, and who shall possess the power and perform the duties attached by law to the office of comptroller during a vacancy in such office and during his absence or inability; he shall employ, from time to time, the necessary clerks to discharge such duties as he shall direct, which clerks shall be appointed and classified by the Secretary of the Treasury in the manner now provided by law. Within fifteen days from the time of notice of his appointment the comptroller shall take and subscribe the oath of office prescribed by the constitution and laws of the United States; and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible

sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office. The deputy-comptroller so appointed shall also take the oath of office prescribed by the constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars. The comptroller and deputy-comptroller shall not, either directly or indirectly, be interested in any association issuing national currency under the provisions of this act.

SEC. 2. *And be it further enacted*, That the comptroller of the currency, with the approval of the Secretary of the Treasury, shall devise a seal, with suitable inscriptions, for his office, a description of which, with a certificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State with an impression thereof which shall thereupon become the seal of office of the comptroller of the currency, and the same may be renewed when necessary. Every certificate, assignment, and conveyance executed by the comptroller, in pursuance of any authority conferred on him by law, and sealed with his seal of office, shall be received in evidence in all places and courts whatsoever; and all copies of papers in the office of the comptroller, certified by him and authenticated by the said seal, shall in all cases be evidence equally and in like manner as the original. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

SEC. 3. *And be it further enacted*, That there shall be assigned to the comptroller of the currency by the Secretary of the Treasury suitable rooms in the treasury building for conducting the business of the currency bureau, in which shall be safe and secure fire-proof vaults, in which it shall be the duty of the comptroller to deposit and safely keep all the plates not necessarily in the possession of engravers or printers, and other valuable things belonging to his department; and the comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniencies for the transaction of the said business.

SEC. 4. *And be it further enacted*, That the term "United States Bonds," as used in this act, shall be construed to mean all registered bonds now issued, or that may hereafter be issued, on the faith of the United States by the Secretary of the Treasury in pursuance of law.

SEC. 5. *And be it further enacted*, That associations for carrying on the business of banking may be formed by any number of persons, not less in any case than five, who shall enter into articles of association, which shall specify in general terms the object for which the

association is formed, and may contain any other provisions, not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs, which said articles shall be signed by the persons uniting to form the association, and a copy of them forwarded to the comptroller of the currency to be filed and preserved in his office.

SEC. 6. *And be it further enacted*, That the persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specify —

First. The name assumed by such association, which name shall be subject to the approval of the comptroller.

Second. The place where its operations of discount and deposit are to be carried on, designating the state, territory, or district, and also the particular county and city, town, or village.

Third. The amount of its capital stock, and the number of shares into which the same shall be divided.

Fourth. The names and places of residence of the shareholders, and the number of shares held by each of them.

Fifth. A declaration that said certificate is made to enable such persons to avail themselves of the advantages of this act.

The said certificate shall be acknowledged before a judge of some court of record or a notary public, and such certificate, with the acknowledgment thereof authenticated by the seal of such court or notary, shall be transmitted to the comptroller of the currency, who shall record and carefully preserve the same in his office. Copies of such certificate, duly certified by the comptroller, and authenticated by his seal of office, shall be legal and sufficient evidence in all courts and places within the United States, or the jurisdiction of the government thereof, of the existence of such association, and of every other matter or thing which could be proved by the production of the original certificate.

SEC. 7. *And be it further enacted*, That no association shall be organized under this act, with a less capital than one hundred thousand dollars, nor in a city whose population exceeds fifty thousand persons, with a less capital than two hundred thousand dollars ; *Provided*, That banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants.

SEC. 8. *And be it further enacted*, That every association formed pursuant to the provisions of this act shall, from the date of the execution of its organization certificate, be a body corporate, but shall transact no business except such as may be incidental to its organization and necessarily preliminary, until authorized by the comptroller of the currency to commence the business of banking. Such association shall have power to adopt a corporate seal, and shall have succession by the name designated in its organization certificate, for the period of twenty years from its organization, unless sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless the franchise shall be forfeited by a violation of this act; by such name it may make contracts, sue and be sued, complain and defend, in any court of law and equity as fully as natural persons; it may elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss said officers or any of them at pleasure, and appoint others to fill their places, and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act; and its board of directors shall also have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed; and its usual business shall be transacted at an office or banking house located in the place specified in its organization certificate.

SEC. 9. *And be it further enacted*, That the affairs of every association shall be managed by not less than five directors, one of whom shall be the president. Every director shall, during his whole term of service, be a citizen of the United States; and at least three-fourths of the directors shall have resided in the state, territory, or district in which such association is located one year next preceding their election as directors, and be residents of the same during their continuance in office. Each director shall own, in his own right, at least

ten shares of the capital stock of the association of which he is a director. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this act, and that he is the *bona fide* owner, in his own right, of the number of shares of stock required by this act, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt: which oath, subscribed by himself, and certified by the officer before whom it is taken, shall be immediately transmitted to the comptrollor of the currency, and by him filed and preserved in his office.

SEC. 10. *And be it further enacted*, That the directors of any association first elected or appointed shall hold their places until their successors shall be elected and qualified. All subsequent elections shall be held annually on such day in the month of January as may be specified in the articles of association; and the directors so elected shall hold their places for one year, and until their successors are elected and qualified. But any director ceasing to be the owner of the requisite amount of stock, or having in any other manner become disqualified, shall thereby vacate his place. Any vacancy in the board shall be filled by appointment by the remaining directors, and any directer so appointed shall hold his place until the next election. If from any cause an election of directors shall not be made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if the election should not be held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise: *Provided*, That if the directors fail to fix the day, as aforesaid, shareholders representing two-thirds of the shares may.

SEC. 11. *And be it further enacted*, That in all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him.

Shareholders may vote by proxies duly authorized in writing: but no officer, clerk, teller, or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

SEC. 12. *And be it further enacted*, That the capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this act, and of each existing bank or banking association that may accept the provisions of this act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the comptroller of the currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this act; and if at any time there shall be a deficiency in said surplus of twenty per centum, the said banking association shall not pay any dividends to its shareholders until such deficiency shall be made good: and in case of such deficiency, the comptroller of the currency may compel said banking association to close its business and wind up its affairs under the provisions of this act. And the comptroller shall have authority to withhold from an association his certificate authorizing the commencement of business, whenever he shall have reason to suppose that the shareholders thereof have formed the same for any other than the legitimate objects contemplated by this act.

SEC. 13. *And be it further enacted*, That it shall be lawful for any association formed under this act, by its articles of association, to provide for an increase of its capital from time to time, as may be

deemed expedient, subject to the limitations of this act: *Provided*, That the maximum of such increase in the articles of association shall be determined by the comptroller of the currency; and no increase of capital shall be valid until the whole amount of such increase shall be paid in, and notice thereof shall have been transmitted to the comptroller of the currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association. And every association shall have power, by the vote of shareholders owning two-thirds of its capital stock, to reduce the capital of such association to any sum not below the amount required by this act, in the formation of associations: *Provided*, That by no such reduction shall its capital be brought below the amount required by this act for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the comptroller of the currency and his approval thereof obtained.

SEC. 14. *And be it further enacted*, That at least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in instalments of at least ten per centum each on the whole amount of the capital as frequently as one instalment at the end of each succeeding month from the time it shall be authorized by the comptroller to commence business; and the payment of each instalment shall be certified to the comptroller, under oath, by the president or cashier of the association.

SEC. 15. *And be it further enacted*, That if any shareholder, or his assignee, shall fail to pay any instalment on the stock when the same is required by the foregoing section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, and if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, and not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order within

six months from the time of such forfeiture, and if not sold it shall be cancelled and deducted from the capital stock of the association; and if such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by this act, the capital stock shall, within thirty days from the date of such cancellation, be increased to the requirements of the act; in default of which a receiver may be appointed to close up the business of the association according to the provisions of the fiftieth section of this act.

SEC. 16. *And be it further enacted*, That every association, after having complied with the provisions of this act, preliminary to the commencement of banking business under its provisions, and before it shall be authorized to commence business, shall transfer and deliver to the treasurer of the United States any United States registered bonds bearing interest to an amount not less than thirty thousand dollars nor less than one-third of the capital stock paid in, which bonds shall be deposited with the treasurer of the United States and by him safely kept in his office until the same shall be otherwise disposed of, in pursuance of the provisions of this act; and the Secretary of the Treasury is hereby authorized to receive and cancel any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run; and the deposit of bonds shall be, by every association, increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the treasurer registered United States bonds to the amount of at least one-third of its capital stock actually paid in: *Provided*, That nothing in this section shall prevent an association that may desire to reduce its capital or to close up its business and dissolve its organization from taking up its bonds upon returning to the comptroller its circulating notes in the proportion hereinafter named in this act, nor from taking up any excess of bonds beyond one-third of its capital stock and upon which no circulating notes have been delivered.

SEC. 17. *And be it further enacted*, That whenever a certificate shall have been transmitted to the comptroller of the currency, as provided in this act, and the association transmitting the same shall notify the comptroller that at least fifty per centum of its capital stock has been paid in as aforesaid, and that such association has complied with all the provisions of this act as required to be complied with before such association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association,

ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of the directors of such association, and the amount of the capital stock of which each is the *bona fide* owner, and generally whether such association has complied with all the requirements of this act to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors and by the president or cashier of such association, a statement of all the facts necessary to enable the comptroller to determine whether such association is lawfully entitled to commence the business of banking under this act.

SEC. 18. *And be it further enacted*, That if, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it shall appear that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions of this act required to be complied with before being entitled to commence the business of banking under it, and that such association is authorized to commence said business accordingly; and it shall be the duty of the association to cause said certificate to be published in some newspaper published in the city or county where the association is located for at least sixty days next after the issuing thereof: *Provided*, That if no newspaper is published in such city or county the certificate shall be published in a newspaper published nearest thereto.

SEC. 19. *And be it further enacted*, That all transfers of United States bonds which shall be made by any association under the provisions of this act shall be made to the treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier or some other officer of the association making the deposit, a receipt therefor to be given to said association, or by the comptroller of the currency, or by a clerk appointed by him for that purpose, stating that it is held in trust for the association on whose behalf such transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bonds by the treasurer shall be deemed valid or of binding force and effect unless countersigned by the comptroller of

the currency. It shall be the duty of the comptroller of the currency to keep in his office a book in which shall be entered the name of every association from whose accounts such transfer of bonds is made by the treasurer, and the name of the party to whom such transfer is made; and the par value of the bonds so transferred shall be entered therein; and it shall be the duty of the comptroller, immediately upon countersigning and entering the same, to advise by mail the association from whose account such transfer was made of the kind and numerical designation of the bonds and the amount thereof so transferred.

SEC. 20. *And be it further enacted*, That it shall be the duty of the comptroller of the currency to countersign and enter in the book, in the manner aforesaid, every transfer or assignment of any bonds held by the treasurer presented for his signature; and the comptroller shall have at all times during office hours access to the books of the treasurer, for the purpose of ascertaining the correctness of the transfer or assignment presented to him to countersign; and the treasurer shall have the like access to the book above mentioned, kept by the comptroller, during office hours, to ascertain the correctness of the entries in the same; and the comptroller shall also at all times have access to the bonds on deposit with the treasurer, to ascertain their amount and condition.

SEC. 21. *And be it further enacted*, That upon the transfer and delivery of bonds to the treasurer, as provided in the foregoing section, the association making the same shall be entitled to receive from the comptroller of the currency circulating notes of different denominations, in blank, registered and countersigned as hereinafter provided, equal in amount to ninety per centum of the current market value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of said bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum; and at no time shall the total amount of such notes, issued to any such association, exceed the amount at such time actually paid in of its capital stock.

SEC. 22. *And be it further enacted*, That the entire amount of notes for circulation to be issued under this act shall not exceed three hundred millions of dollars. In order to furnish suitable notes for circulation, the comptroller of the currency is hereby authorized and required, under the direction of the Secretary of the Treasury, to cause plates and dies to be engraved, in the best manner to guard

against counterfeiting and fraudulent alterations, and to have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply, under this act, the associations entitled to receive the same; which notes shall express upon their face that they are secured by United States bonds, deposited with the treasurer of the United States, by the written or engraved signatures of the treasurer and register, and by the imprint of the seal of the treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier. And the said notes shall bear such devices and such other statements, and shall be in such form, as the Secretary of the Treasury shall, by regulation, direct: *Provided*, That not more than one-sixth part of the notes furnished to an association shall be of a less denomination than five dollars, and that after specie payments shall be resumed no association shall be furnished with notes of a less denomination than five dollars.

SEC. 23. *And be it further enacted*, That after any such association shall have caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association is hereby authorized to issue and circulate the same as money; and the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except for duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency. And no such association shall issue post notes or any other notes to circulate as money than such as are authorized by the foregoing provisions of this act.

SEC. 24. *And be it further enacted*, That it shall be the duty of the comptroller of the currency to receive worn-out or mutilated circulating notes issued by any such banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to such association other blank circulating notes to an equal amount. And such worn-out or mutilated notes, after a memorandum shall have been entered in the proper books, in accordance

with such regulations as may be established by the comptroller, as well as all circulating notes which shall have been paid or surrendered to be cancelled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the comptroller of the currency, one by the treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. And a certificate of such burning, signed by the parties so appointed, shall be made in the books of the comptroller, and a duplicate thereof forwarded to the association whose notes are thus cancelled.

SEC. 25. *And be it further enacted*, That it shall be the duty of every banking association having bonds deposited in the office of the treasurer of the United States, once or oftener in each fiscal year, and at such time or times during the ordinary business hours as said officer or officers may select to examine and compare the bonds so pledged with the books of the comptroller and the accounts of the association, and, if found correct, to execute to the said treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the treasurer at the date of such certificate. Such examination may be made by an officer or agent of such association, duly appointed in writing for that purpose, whose certificate before mentioned shall be of like force and validity as if executed by such president or cashier; and a duplicate signed by the treasurer shall be retained by the association.

SEC. 26. *And be it further enacted*, That the bonds transferred to and deposited with the treasurer of the United States, as hereinbefore provided, by any banking association for the security of its circulating notes, shall be held exclusively for that purpose, until such notes shall be redeemed, except as provided in this act; but the comptroller of the currency shall give to any such banking association powers of attorney to receive and appropriate to its own use the interest on the bonds which it shall have so transferred to the treasurer; but such powers shall become inoperative whenever such banking association shall fail to redeem its circulating notes as aforesaid. Whenever the market or cash value of any bonds deposited with the treasurer of the United States, as aforesaid, shall be reduced below the amount of the circulation issued for the same, the comptroller of the currency is hereby authorized to demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association receiving said bills, to be deposited with

the treasurer of the United States as long as such depreciation continues. And said comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the treasurer by an association for other bonds of the United States authorized by this act to be received as security for circulating notes, if he shall be of opinion that such an exchange can be made without prejudice to the United States, and he may direct the return of any of said bonds to the banking association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: *Provided*, That the remaining bonds which shall have been transferred by the banking association offering to surrender circulating notes shall be equal to the amount required for the circulating notes not surrendered by such banking association, and that the amount of bonds in the hands of the treasurer shall not be diminished below the amount required to be kept on deposit with him by this act: *And provided*, That there shall have been no failure by such association to redeem its circulating notes, and no other violation by such association of the provisions of this act, and that the market or cash value of the remaining bonds shall not be below the amount required for the circulation issued for the same.

SEC. 27. *And be it further enacted*, That it shall be unlawful for any officer acting under the provisions of this act to countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this act, except as hereinbefore provided, and in accordance with the true intent and meaning of this act. And any officer who shall violate the provisions of this section shall be deemed guilty of a high misdemeanor, and on conviction thereof shall be punished by fine not exceeding double the amount so countersigned and delivered, and imprisonment not less than one year and not exceeding fifteen years, at the discretion of the court in which he shall be tried.

SEC. 28. *And be it further enacted*, That it shall be lawful for any such association to purchase, hold, and convey real estate as follows: —

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by such association, or shall purchase to secure debts due to said association.

Such association shall not purchase or hold real estate in any other case or for any other purpose than as specified in this section. Nor shall it hold the possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.

SEC. 29. *And be it further enacted*, That the total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in: *Provided*, That the discount of *bona fide* bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation, or firm negotiating the same, shall not be considered as money borrowed.

SEC. 30. *And be it further enacted*, That every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State or territory where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced

within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

SEC. 31. *And be it further enacted*, That every association in the cities hereinafter named shall, at all times, have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall, at all times, have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation, and of its deposits. And whenever the lawful money of any association in any of the cities hereinafter named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its circulation and deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States shall be restored: *Provided*, That three-fifths of said fifteen per centum may consist of balances due to an association available for the redemption of its circulating notes from associations approved by the comptroller of the currency, organized under this act, in the cities of Saint Louis, Louisville, Chicago, Detroit, Milwaukie, New Orleans, Cincinnati, Cleveland, Pittsburg, Baltimore, Philadelphia, Boston, New York, Albany, Leavenworth, San Francisco, and Washington City: *Provided, also*, That clearing-house certificates, representing specie or lawful money specially deposited for the purpose of any clearing-house association, shall be deemed to be lawful money in the possession of any association belonging to such clearing-house holding and owning such certificate, and shall be considered to be a part of the lawful money which such association is required to have under the foregoing provisions of this section: *Provided*, That the cities of Charleston and Richmond may be added to the list of cities in the national associations of which other associations may keep three-fifths of their lawful money, whenever, in

the opinion of the comptroller of the currency, the condition of the Southern States will warrant it. And it shall be competent for the comptroller of the currency to notify any association, whose lawful money reserve as aforesaid shall be below the amount to be kept on hand as aforesaid, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money of the United States, the comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of such association, as provided in this act.

SEC. 32. *And be it further enacted*, That each association organized in any of the cities named in the foregoing section shall select, subject to the approval of the comptroller of the currency, an association in the city of New York, at which it will redeem its circulating notes at par. And each of such associations may keep one-half of its lawful money reserve in cash deposits in the city of New York. And each association not organized within the cities named in the preceding section shall select, subject to the approval of the comptroller of the currency, an association in either of the cities named in the preceding section at which it will redeem its circulating notes at par, and the comptroller shall give public notice of the names of the associations so selected at which redemptions are to be made by the respective associations, and of any change that may be made of the association at which the notes of any association are redeemed. If any association shall fail either to make the selection or to redeem its notes as aforesaid, the comptroller of the currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided for in this act, to wind up its affairs: *Provided*, That nothing in this section shall relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money, on demand: *And provided, further*, That every association formed or existing under the provisions of this act shall take and receive at par, for any debt or liability to said association, any and all notes or bills issued by any association existing under and by virtue of this act.

SEC. 33. *And be it further enacted*, That the directors of any association may, semi-annually, each year, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half-year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

SEC. 34. *And be it further enacted*, That every association shall make to the comptroller of the currency a report, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association; which report shall exhibit in detail, and under appropriate heads, the resources and liabilities of the association before the commencement of business on the morning of the first Monday of the months of January, April, July, and October of each year, and shall transmit the same to the comptroller within five days thereafter. And any bank failing to make and transmit such report shall be subject to a penalty of one hundred dollars for each day after five days that such report is delayed beyond that time. And the comptroller shall publish abstracts of said reports in a newspaper to be designated by him for that purpose in the city of Washington, and the separate report of each association shall be published in a newspaper in the place where such association is established, or if there be no newspaper at such place, then in a newspaper published at the nearest place thereto, at the expense of the association making such report. In addition to the quarterly reports required by this section, every association shall, on the first Tuesday of each month, make to the comptroller of the currency a statement, under the oath of the president or cashier, showing the condition of the association making such statement on the morning of the day next preceding the date of such statement, in respect to the following items and particulars; to wit: average amount of loans and discounts, specie, and other lawful money belonging to the association, deposits, and circulation. And associations in other places than those cities named in the thirty-first section of this act shall also return the amount due them available for the redemption of their circulation.

SEC. 35. *And be it further enacted*, That no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association, according to the provisions of this act.

SEC. 36. *And be it further enacted*, That no association shall at any time be indebted, or in any way liable, to an amount exceeding the

amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on the following accounts; that is to say: —

First. On account of its notes of circulation.

Second. On account of moneys deposited with, or collected by, such association.

Third. On account of bills of exchange or drafts drawn against money actually on deposit to the credit of such association, or due thereto.

Fourth. On account of liabilities to its stockholders for dividends and reserved profits.

SEC. 37. *And be it further enacted*, That no association shall, either directly or indirectly, pledge or hypothecate any of its notes of circulation, for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

SEC. 38. *And be it further enacted*, That no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in form of dividends or otherwise, any portion of its capital. And if losses shall at any time have been sustained by any such association equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it shall continue its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. And all debts due to any association, on which interest is past due and unpaid for a period of six months, unless the same shall be well secured, and shall be in process of collection, shall be considered bad debts within the meaning of this act: *Provided*, That nothing in this section shall prevent the reduction of the capital stock of the association under the thirteenth section of this act.

SEC. 39. *And be it further enacted*, That no association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation the notes of any bank or banking association which shall not, at any such time, be receivable, at par, on deposit and in payment of debts by the association so paying out or circulating such notes; nor shall it knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such

paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States.

SEC. 40. *And be it further enacted*, That the president and cashier of every such association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted; and such li·t shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority during business hours of each day in which business may be legally transacted; and a copy of such list, on the first Monday of July in each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency.

SEC. 41. *And be it further enacted*, That the plates and special dies to be procured by the comptroller of the currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the provisions of this act respecting the procuring of such notes, and all other expenses of the bureau, shall be paid out-of the proceeds of the taxes or duties now or hereafter to be assessed on the circulation, and collected from associations organized under this act. And in lieu of all existing taxes, every association shall pay to the treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half-year from and after the first day of January, eighteen hundred and sixty-four, upon the average amount of its notes in circulation, and a duty of one-quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half-year, as aforesai l, on the average amount of its capital stock beyond the amount invested in United States bonds; and in case of default in the payment thereof by any association, the duties aforesaid may be collected in the manner provided for the collection of United States duties of other corporations, or the treasurer may reserve the amount of said duties out of the interest, as it may become due, on the bonds deposited with him by such defaulting association. And it shall be the duty of each association, within ten days from the first days of January and July of each year, to make a return, under the oath of its president or cashier, to the treasurer of the United States, in such form as he may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its

1 o/o on notes in cir; ½ o/o on av. deposit, ½ o/o on cap. stock over amt invested in bonds,

capital stock, beyond the amount invested in United States bonds, for the six months next preceding said first days of January and July as aforesaid, and in default of such return, and for each default thereof, each defaulting association shall forfeit and pay to the United States the sum of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States; and in case of such default the amount of the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the comptroller of the currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such other manner as the treasurer may deem best: *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *Provided, further*, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate of associations from either State, county, or municipial taxes to the same extent, according to its value, as other real estate is taxed.

SEC. 42. *And be it further enacted*, That any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. And whenever such vote shall be taken it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the comptroller of the currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in a city or town in which the association is located, and if no newspaper be there published, then in the newspaper published nearest thereto, that said association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against

the association for payment. And at any time after the expiration of one year from the time of the publication of such notice as aforesaid, the said association may pay over to the treasurer of the United States the amount of its outstanding notes in the lawful money of the United States, and take up the bonds which said association has on deposit with the treasurer for the security of its circulating notes; which bonds shall be assigned to the bank in the manner specified in the nineteenth section of this act, and from that time the outstanding notes of said association shall be redeemed at the treasury of the United States, and the said association and the shareholders thereof shall be discharged from all liabilities therefor.

SEC. 43. *And be it further enacted*, That the treasurer, on receiving from an association lawful money for the payment and redemption of its outstanding notes, as provided for in the preceding section of this act, shall execute duplicate receipts therefor, one to the association and the other to the comptroller of the currency, stating the amount received by him, and the purpose for which it has been received, which amount shall be paid into the treasury of the United States, and placed to the credit of such association upon redemption account. And it shall be the duty of the treasurer, whenever he shall redeem any of the notes of said association, to cause the same to be mutilated and charged to the redemption account of said association; and all notes so redeemed by the treasurer shall, every three months, be certified to and burned in the manner prescribed in the twenty-fourth section of this act.

SEC. 44. *And be it further enacted*, That any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of this act, become a national association under its provisions, by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a national association under this act. And a majority of the directors, after executing said articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the

same amount each as they were before said conversion, and the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of this act; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this act. When the comptroller shall give to such association a certificate, under his hand and official seal, that the provisions of this act have been complied with, and that it is authorized to commence the business of banking under it, the association shall have the same powers aud privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects as are prescribed in this act for other associations organized under it, and shall be held and regarded as an association under this act: *Provided, however*, That no such association shall have a less capital than the amount prescribed for banking associations under this act.

SEC. 45. *And be it further enacted*, That all associations under this act, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the government, as may be required of them. And the Secretary of the Treasury shall require of the associations thus designated satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government: *Provided*, That every association which shall be selected and designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid in to the government for internal revenue, or for loans or stocks.

SEC. 46. *And be it further enacted*, That if any such association shall at any time fail to redeem, in the lawful money of the United States, any of its circulating notes, when payment thereof shall be lawfully demanded, during the usual hours of business, at the office of such association, or at its place of redemption aforesaid, the holder may cause the same to be protested, in one package, by a notary-public, unless the president or cashier of the association whose notes

are presented for payment, or the president or cashier of the association at the place at which they are redeemable, shall offer to waive demand and notice of the protest, and shall, in pursuance of such offer, make, sign, and deliver to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof; and such notary-public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the comptroller of the currency, retaining a copy thereof. And after such default, on examination of the facts by the comptroller, and notice by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits: *Provided*, That if satisfactory proof be produced to such notary-public that the payment of any such notes is restrained by order of any court of competent jurisdiction, such notary-public shall not protest the same; and when the holder of such notes shall cause more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

SEC. 47. *And be it further enacted*, That on receiving notice that any such association has failed to redeem any of its circulating notes, as specified in the next preceding section, the comptroller of the currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent (of whose appointment immediate notice shall be given to such association) who shall immediately proceed to ascertain whether such association has refused to pay its circulating notes in the lawful money of the United States, when demanded as aforesaid, and report to the comptroller the fact so ascertained; and if, from such protest or the report so made, the comptroller shall be satisfied that such association has refused to pay its circulating notes as aforesaid and is in default, he shall, within thirty days after he shall have received notice of such failure, declare the United States bonds and securities pledged by such association forfeited to the United States, and the same shall thereupon be forfeited accordingly. And thereupon the comptroller shall immediately give notice in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association to present them for payment at the treasury of the United States, and the same shall be paid as presented in lawful money of

the United States; whereupon said comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid. And it shall be lawful for the Secretary of the Treasury, from time to time, to make such regulations respecting the disposition to be made of such circulating notes after presentation thereof for payment as aforesaid, and respecting the perpetuation of the evidence of the payment thereof as may seem to him proper; but all such notes, on being paid, shall be cancelled. And for any deficiency in the proceeds of the bonds pledged by such association, when disposed of as hereinafter specified, to reimburse to the United States the amount so expended in paying the circulating notes of such association, the United States shall have a first and paramount lien upon all the assets of such association; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

SEC. 48. *And be it further enacted*, That whenever the comptroller shall become satisfied, as in the last preceding section specified, that any association has refused to pay its circulating notes as therein mentioned, he may, instead of cancelling the United States bonds pledged by such association, as provided in the next preceding section, cause so much of them as may be necessary to redeem the outstanding circulating notes of such association to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to such association.

SEC. 49. *And be it further enacted*, That the comptroller of the currency may, if he shall be of opinion that the interests of the United States will be best promoted thereby, sell at private sale any of the bonds pledged by such association, and receive therefor either money or the circulating notes of such failing association: *Provided*, That no such bonds shall be sold by private sale for less than par, nor less than the market value thereof at the time of sale: *And provided, further*, That no sales of any such bonds, either public or private, shall be complete until the transfer thereof shall have been made with the formalities prescribed in this act.

SEC. 50. *And be it further enacted*, That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the

direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to such association, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller of the currency, and also make report to the comptroller of the currency of all his acts and proceedings. The comptroller shall thereupon cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof. And from time to time the comptroller, after full provision shall have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction; and from time to time, as the proceeds of the assets of such association shall be paid over to him, he shall make further dividends, as aforesaid, on all claims previously proved or adjudicated; and the remainder of such proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held: *Provided, however,* That if such association against which proceedings have been so instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, shall deny having failed to do so, such association may, at any time within ten days after such association shall have been notified of the appointment of an agent, as provided in this act, apply to the nearest circuit, or district, or territorial court of the United States, to enjoin further proceedings in the premises; and such court, after citing the comptroller of the currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the comptroller, and any

receiver acting under his direction, from all further proceedings on account of such alleged refusal.

SEC. 51. *And be it further enacted,* That all fees for protesting the notes issued by any such banking association shall be paid by the person procuring the protest to be made, and such banking association shall be liable therefor; but no part of the bonds pledged by such banking association, as aforesaid, shall be applied to the payment of such fees. And all expenses of any preliminary or other examinations into the condition of any association shall be paid by such association; and all expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

SEC. 52. *And be it further enacted,* That all transfer of the notes, bonds, bills of exchange, and other evidences of debt owing to any association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void.

SEC. 53. *And be it further enacted,* That if the directors of any association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this act, all the rights, privileges, and franchises of the association derived from this act shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

SEC. 54. *And be it further enacted,* That the comptroller of the currency, with the approbation of the Secretary of the Treasury, as often as shall be deemed necessary or proper, shall appoint a suitable person or persons to make an examination of the affairs of every banking

association, which person shall not be a director or other officer in any association whose affairs he shall be appointed to examine, and who shall have power to make a thorough examination into all the affairs of the association, and in doing so, to examine any of the officers and agents thereof on oath ; and shall make a full and detailed report of the condition of the association to the comptroller. And the association shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery. And every person appointed to make such examination shall receive for his services at the rate of five dollars for each day by him employed in such examination, and two dollars for every twenty-five miles he shall necessarily travel in the performance of his duty, which shall be paid by the association by him examined.

SEC. 55. *And be it further enacted*, That every president, director, cashier, teller, clerk, or agent of any association, who shall embezzle, abstract, or wilfully misapply any of the moneys, funds, or credits of the association, or shall, without authority from the directors, issue or put in circulation any of the notes of the association, or shall, without such authority, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or shall make any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than five nor more that ten years.

SEC. 56. *And be it further enacted*, That all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury.

SEC. 57. *And be it further enacted*, That suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established ; or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases : *Provided*, *however*, That

all proceedings to enjoin the comptroller uuder this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located.

SEC. 58. *And be it further enacted*, That every person who shall mutilate, cut, deface, disfigure, or perforate with holes, or shall unite or cement together, or do any other thing to any bank-bill, draft, note, or other evidence of debt, issued by any such association, or shall cause or procure the same to be doue, with intent to render such bank-bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall, upon conviction, forfeit fifty dollars to the association who shall be injured thereby, to be recovered by action in any court having jurisdiction.

SEC. 59. *And be it further enacted*, That if any person shall falsely make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes issued under the provisions of this act, or shall pass, utter, or publish, or attempt to pass, utter, or publish, any false, forged, or counterfeited note, purporting to be issued by any association doing a banking business under the provisions of this act, knowing the same to be falsely made, forged, or counterfeited, or shall falsely alter, or cause or procure to be falsely altered, or willingly aid or assist in falsely altering, any such circulating notes, issued as aforesaid, or shall pass, utter, or publish, or attempt to pass, utter, or publish, as true, any falsely altered or spurious circulating note issued, or purporting to have been issued, as aforesaid, knowing the same to be falsely altered or spurious, every such person shall be deemed and adjudged guilty of felony, and being thereof convicted by due course of law shall be sentenced to be imprisoned and kept at hard labor for a period of not less than five years, nor more than fifteen years, and fined in a sum not exceeding one thousand dollars.

SEC. 60. *And be it further enacted*, That if any person shall make or engrave, or cause or procure to be made or engraved, or shall have in his custody or possession any plate, die, or block after the similitude of any plate, die, or block from which any circulating notes issued as aforesaid shall have been prepared or printed, with intent to use such plate, die, or block, or cause or suffer the same to be used, in forging or counterfeiting any of the notes issued as aforesaid, or shall have in his custody or possession any blank note or notes engraved and printed after the similitude of any notes issued as aforesaid, with intent to use

such blanks, or cause or suffer the same to be used, in forging or counterfeiting any of the notes issued as aforesaid, or shall have in his custody or possession any paper adapted to the making of such notes, and similar to the paper upon which any such notes shall have been issued, with intent to use such paper, or cause or suffer the same to be used, in forging or counterfeiting any of the notes issued as aforesaid, every such person, being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a term not less than five or more than fifteen years, and fined in a sum not exceeding one thousand dollars.

SEC. 61. *And be it further enacted*, That it shall be the duty of the comptroller of the currency to report annually to Congress at the commencement of its session —

First. A summary of the state and condition of every association from whom reports have been received the preceding year, at the several dates to which such reports refer, with an abstract of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to said associations as, in his judgment, may be useful.

Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

Third. Any amendment to the laws relative to banking by which the system may be improved, and the security of the holders of its notes and other creditors may be increased.

Fourth. The names and compensation of the clerks employed by him, and the whole amount of the expenses of the banking department during the year. And such report shall be made by or before the first day of December in each year, and the usual number of copies for the use of the senate and house, and one thousand copies for the use of the department, shall be printed by the public printer and in readiness for distribntion at the first meeting of Congress.

SEC. 62. *And be it further enacted*, That the act entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February twenty-fifth, eighteen hundred and sixty-three, is hereby repealed: *Provided*, That such repeal shall not affect any ap-

pointments made, acts done, or proceedings had, or the organization, acts, or proceedings of any association organized or in the process of organization under the act aforesaid: *And provided also*, That all such associations so organized or in process of organization shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this act, and with the approval of the comptroller of the currency, in lieu of the name specified in their respective organization certificates, may take any other name preferred by them and duly certified to the comptroller, without prejudice to any right acquired under this act or under the act hereby repealed: but no such change shall be made after six months from the passage of this act: *Provided, also*, That the circulation issued or to be issued by such association shall be considered as a part of the circulation provided for in this act.

SEC. 63. *And be it further enacted*, That persons holding stock as executors, administrators, guardians, and trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in said trust-funds would be if they were respectively living and competent to act and hold the stock in their own names.

SEC. 64. *And be it further enacted*, That Congress may at any time amend, alter, or repeal this act.

AMENDMENTS TO THE ABOVE ACT.

Laws of 1864–5, *chap.* 78, *sec.* 7.

And be it further enacted, That any existing bank organized under the laws of any State, having a paid-up capital of not less than seventy-five thousand dollars, which shall apply before the first day of July next for authority to become a national bank under the act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, eighteen hundred and sixty-four, and shall comply with all the requirements of said act, shall, if such bank be found by the comptroller of the currency to be

in good standing and credit, receive such authority in preference to new associations applying for the same: *Provided*, That it shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank and each branch to be regulated by the amount of capital assigned to and used by each.

CHAP. LXXXII.—*An Act to amend an Act entitled "An Act to provide a National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof."*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-one of said act be so amended that said section shall read as follows:

SEC. 21. *And be it further enacted*, That upon the transfer and delivery of bonds to the treasurer, as provided in the foregoing section, the association making the same shall be entitled to receive from the comptroller of the currency circulating notes of different denominations, in blank, registered and countersigned as hereinafter provided, equal in amount to ninety per centum of the current market value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of said bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum; and the amount of said circulating notes to be furnished to each association shall be in proportion to its paid-up capital as follows, and no more: To each association whose capital shall not exceed five hundred thousand dollars, ninety per centum of such capital; to each association whose capital exceeds five hundred thousand dollars, but does not exceed one million dollars, eighty per centum of such capital; to each association whose capital exceeds one million dollars, but does not exceed three millions of dollars, seventy-five per centum of such capital; to each association whose capital exceeds three millions of dollars, sixty per cent of such capital. And that one hundred and fifty millions of dollars of the entire amount of circulating notes authorized to be issued shall be apportioned to associations in the States, in the District of Columbia, and in the territories, ac-

cording to representative population, and the remainder shall be apportioned by the Secretary of the Treasury among associations formed in the several States, in the District of Columbia, and in the territories, having due regard to the existing banking capital, resources, and business of such States, district, and territories.

APPROVED, March 3, 1865.

Acts of 1866–7, *chap.* 194.

The "temporary loan certificates" may constitute and be held by any national bank holding or owning the same, as a part of the reserve provided for in Secs. 31 and 32 of the Act of June 3, 1864.

APPROVED, March 2, 1867.

To the same effect is the Act approved, July 25, 1868, which authorized the issue of an additional amount of these certificates.

Acts of 1868–9.

CHAP. XXXII. — *An Act to prevent loaning Money upon United States Notes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no national banking association shall hereafter offer or receive United States notes or national bank notes as security or as collateral security for any loan of money, or for a consideration shall agree to withhold the same from use, or shall offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money; and any national banking association offending against the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof in any United States court having jurisdiction shall be punished by a fine not exceeding one thousand dollars, and by a further sum equal to one-third of the money so loaned; and the officer or officers of said bank who shall make such loan or loans shall be liable for a further sum equal to one-quarter of the money so loaned; and the prosecution of such offenders shall be commenced and conducted as provided for the punishment of offences in an act to provide a national currency, approved June third, eighteen hundred and sixty-four, and the fine or penalty so recovered shall be for the benefit of the party bringing such suit.

APPROVED, February 19, 1869.

CHAP. CXXX. — *An Act regulating the Reports of National Banking Associations.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in lieu of all reports required by section thirty-four of the national currency act, every association shall make to the comptroller of the currency not less than five reports during each and every year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors; which report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day to be by him specified, and shall transmit such report to the comptroller within five days after the receipt of a request or requisition therefor from him; and the report of each association above required, in the same form in which it is made to the comptroller, shall be published in a newspaper published in the place where such association is established, or if there be no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association: and such proof of publication shall be furnished as may be required by the comptroller. And the comptroller shall have power to call for special reports from any particular association whenever in his judgment the same shall be necessary in order to a full and complete knowledge of its condition. Any association failing to make and transmit any such report shall be subject to a penalty of one hundred dollars for each day after five days that such bank shall delay to make and transmit any report as aforesaid; and in case any association shall delay or refuse to pay the penalty herein imposed when the same shall be assessed by the comptroller of the currency, the amount of such penalty may be retained by the treasurer of the United States, upon the order of the comptroller of the currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation; and all sums of money collected for penalties under this section shall be paid into the treasury of the United States.

SEC. 2. *And be it further enacted,* That, in addition to said reports, each national banking association shall report to the comptroller of the currency the amount of each dividend declared by said association, and the amount of net earnings in excess of said dividends,

which report shall be made within ten days after the declaration of each dividend, and attested by the oath of the president or cashier of said association, and a failure to comply with the provisions of this section shall subject such association to the penalties provided in the foregoing section.

APPROVED, March 3, 1869.

CHAP. CXXXV.—*An Act in Reference to Certifying Checks by National Banks.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any officer, clerk, or agent of any national bank to certify any check drawn upon said bank unless the person or company drawing said check shall have on deposit in said bank at the time such check is certified an amount of money equal to the amount specified in such check; and any check so certified by duly authorized officers shall be a good and valid obligation against such bank; and any officer, clerk, or agent of any national bank violating the provisions of this act shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in section fifty of the national banking law, approved June third, eighteen hundred and sixty-four.

APPROVED, March 3, 1869.

CHAP. CXLV. — *An Act to amend an Act entitled "An Act to provide a National Currency secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof," by extending certain Penalties to Accessories.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person who shall aid or abet any officer or agent of any association in doing any of the acts enumerated in section fifty-two of an act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved February twenty-fifth, eighteen hundred and sixty-three, with intent to defraud or deceive, shall be liable to the same punishment therein provided for the principal.

APPROVED, March 3, 1869.

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